No. 08-372
Vide 08-240
Title: Shell Oil Products Company LLC, et al., Petitioners
v.
Mac's Shell Service, Inc., et al.
Docketed: September 24, 2008
Lower Ct: United States Court of Appeals for the First Circuit
Case Nos.: (05-2771)
Decision Date: April 18, 2008
Rehearing Denied: May 23, 2008
Questions Presented

Date	Proceedings and Orders
Aug 8 2008	Application (08A123) to extend the time to file a petition for a writ of certiorari from August 21, 2008 to September 20, 2008, submitted to Justice Souter.
Aug 14 2008	Application (08A123) granted by Justice Souter extending the time to file until September 20, 2008.
Sep 19 2008	Petition for a writ of certiorari filed. (Response due October 24, 2008)
Oct 24 2008	Brief amicus curiae of American Petroleum Institute filed.
Oct 24 2008	Brief of respondents Mac's Shell Service, Inc., et al. in opposition filed.
Nov 7 2008	Reply of petitioners Shell Oil Products Company LLC, et al. filed. (Distributed)
Nov 10 2008	DISTRIBUTED for Conference of November 25, 2008.
Dec 1 2008	The Solicitor General is invited to file a brief in this case expressing the views of the United States.
May 15 2009	Brief amicus curiae of United States filed. VIDED.
May 26 2009	DISTRIBUTED for Conference of June 11, 2009.
Jun 15 2009	Petition GRANTED. The petition for a writ of certiorari in No. 08-240 is granted. The cases are consolidated and a total of one hour is allotted for oral argument.
Jun 26 2009	Motion of the parties to amend the briefing schedule filed. VIDED.
Jul 27 2009	Motion of the parties to amend the briefing schedule GRANTED. Petitioners in No. 08-372 will file an opening brief on or before August 21, 2009. Petitioners in No. 08-240 will file a response brief on or before September 30, 2009. Petitioners in No. 08-372 will file a reply brief on or before October 30, 2009. Petitioners in No. 08-240 will file a supplemental brief on or before November 13, 2009.
Aug 21 2009	Joint appendix filed. VIDED.
Aug 21 2009	Brief of Shell Oil Products Company LLC, et al. filed. VIDED.
Aug 27 2009	Brief amicus curiae of American Petroleum Institute filed. VIDED.
Aug 28 2009	Brief amicus curiae of United States filed. VIDED.
Oct 19 2009	Brief of Mac's Shell Service, Inc., et al. filed. VIDED. (Distributed)
Oct 26 2009	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed. VIDED.
Nov 2 2009	SET FOR ARGUMENT ON Tuesday, January 19, 2010
Nov 2 2009	CIRCULATED.
Nov 9 2009	Motion of the Solicitor General for leave to participate in oral argument as amici curiae and for divided argument GRANTED. VIDED.

Nov 18 2009	Reply of petitioners Shell Oil Products Company LLC, et al. filed. VIDED. (Distributed)
Dec 2 2009	Supplemental brief of respondents Mac's Shell Service, Inc., et al. filed. VIDED. (Distributed)
Jan 19 2010	Argued. For Shell Oil Products Company, LLC, et al.: Jeffrey A. Lamken, Washington, D. C.; and David O'Neil, Assistant to the Solicitor General, Department of Justice, Washington, D.C. (for United States, as amicus curiae.) For Mac's Shell Service, Inc., et al.: John F. Farraher, Jr., Boston, Mass.

Supreme Court, U.S.
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No. 08-372

IN THE

Supreme Court of the United States

SHELL OIL PRODUCTS COMPANY LLC; MOTIVA ENTERPRISES LLC; SHELL OIL COMPANY, INC.,

Petitioners,

v.

MAC'S SHELL SERVICE, INC.; CYNTHIA KAROL; JOHN A. SULLIVAN; AKMAL, INC.; SID PRASHAD; RAM CORPORATION, INC.; J&M AVRAMIDIS, INC.; STEPHEN PISARCZYK,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

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QUESTION PRESENTED

The Petroleum Marketing Practices Act, 15 U.S.C. §§ 2801-2806, regulates the circumstances in which an oil refiner or distributor can "terminate" a service station franchise. In this case, the First Circuit, in conflict with the decisions of other courts of appeals, allowed service station operators to sue for "constructive termination" even though they continued to operate their stations (indeed, many were still operating their stations at the time of trial, almost five years after they claim to have been "constructively terminated"). The question presented is:

Whether a service station operator that continues to operate its franchise—using the same trademark, selling the same fuel, and occupying the same premises—can bring an action claiming that it was "constructively terminated" in violation of the Act.

PARTIES TO THE PROCEEDINGS BELOW

Petitioners Shell Oil Products Company LLC, Motiva Enterprises LLC, and Shell Oil Company, Inc., were defendants in the district court and appellants in the court of appeals.

Respondents Mac's Shell Service, Inc., Cynthia Karol, John A. Sullivan, Akmal, Inc., Sid Prashad, RAM Corporation, Inc., J&M Avramidis, Inc., and Stephen Pisarczyk were plaintiffs in the district court and appellees in the court of appeals. Three K's, Inc., was a plaintiff in the district court and an appellee in the court of appeals.

Francis Marcoux, Abraham Abraham, Jordan Avramidis, Chriss Azazian, Richard Baima, Ed Baker, Steve Black, James Coggeshall, Michael Corbett, Patricia Dasilva, Alex Dasilva, Steve Falcone, George Fontaine, Bill Fontaine, Camille Francis, Matty Gaeta, Donald Gagnon, John Generoso, Kal Hamze, Abraham Hamze, Tibor Hangyal, Adam Hipp, Abdul Kafal, George Kantarges, Jim Kantarowski, William Kaufman, Joe Kelleher, Hussein Kobessi, Mike Lamarche, Richard Melanson, Akmal Moawed, Constantin Peides, Harvey Rudnick, Roger Thibault, Dimitrious Tsanikilides, Stephen Shea, J. Enterprise, Inc., Nikolas Manousaridis, Paul Sroczynski, JES Service, Inc., Ronnie Aboud, Mahendrs Amin, Massoud Atalish, Mike Atalish, Douglas Chapman, Steve Frangias, John Golden, Kal Hamze, Patrick Hines, Muhammad Imatiaz, Jay Jon, Kay Jon, Jaque Kanaan, Hussein Kobessi, James Moraidis, Sunny Patel, Russell Picard, Paul Richards, Fred Saad, Aziz Saba, Walid Samrout, Earl Stickney, Thomas Sullivan, Toufic Atallah, Dror Dusdushman, Earl McLaughlin, Wilson Tiburtino, Lasco Enterprises, Inc., and Larry Rubensein were plaintiffs in the district court.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Shell Oil Products Company LLC, Motiva Enterprises LLC, and Shell Oil Company, Inc., state as follows:

1. Shell Oil Company is a Delaware corporation and a wholly owned subsidiary of Shell Petroleum, Inc. Shell Petroleum, Inc. is a Delaware corporation, the shares of which are owned directly or indirectly by Shell Petroleum N.V. Shell Petroleum N.V. was founded under the laws of the Netherlands. The shares of Shell Petroleum N.V. are owned 100% by Royal Dutch Shell plc, a publicly traded company. Royal Dutch Shell plc is the ultimate parent company of the companies which comprise the Shell Group.

2. Motiva Enterprises LLC is a Delaware limited liability company in which Shell Oil Company and Saudi Refining Inc. respectively own directly or indirectly 50% of the ownership interests. The ultimate parent company of Saudi Refining Inc. is the Saudi Arabian Oil Company ("Saudi Aramco"). Saudi Refining Inc. and Saudi Aramco are not publicly traded companies.

3. Shell Oil Products Company was formed as a Delaware corporation wholly owned by Shell Oil Company. On April 1, 2001, Shell Oil Products Company converted to a Delaware limited liability company now known as Shell Oil Products Company LLC. Shell Oil Products Company LLC is wholly owned by Shell Oil Company.

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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Shell Oil Products Company LLC, Motiva Enterprises LLC, and Shell Oil Company, Inc., respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-33a) is published at 524 F.3d 33 (1st Cir. 2008). The orders and judgment of the district court (App., *infra*, 34a-63a) are unreported.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on April 18, 2008. The court of appeals denied a petition for rehearing and rehearing en banc on May 23, 2008 (App., *infra*, 64a-66a). On August 14, 2008, Justice Souter extended the time to file a petition for a writ of certiorari to and including September 20, 2008. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Title I of the Petroleum Marketing Practices Act, 15 U.S.C. §§ 2801-2806, is set forth in the Appendix (App., *infra*, 67a-91a).

STATEMENT

This petition presents an important issue that has squarely divided the courts of appeals. The Petroleum Marketing Practices Act ("PMPA"), 15 U.S.C. §§ 2801-2806, regulates the circumstances in which an oil refiner can "terminate" or "fail to renew" a service station franchise. The First and Fourth Circuits have construed the term "terminate" expansively. Under their decisions, a franchisee can sue for "constructive termination" even if it continues to operate its franchise. In this case, for example, the First Circuit allowed service station operators to sue for "constructive termination" even if they were still operating their stations at the time of trial—almost five years after they claim to have been "constructively terminated." By contrast, the Sixth and Ninth Circuits require an actual end to the franchise as a prerequisite to any constructive termination claim. This case provides the Court with an opportunity to resolve that longstanding conflict.[1]

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[1] Respondents have filed their own petition for a writ of certiorari from the same judgment (No. 08-240), asking this Court to resolve a closely related issue: whether a dealer can claim it was "construc-

I. STATUTORY FRAMEWORK

A. Oil refiners provide motor fuel to the public through service stations that are often operated by independent dealers pursuant to petroleum franchise agreements. Those agreements typically authorize the dealer to use the refiner's trademark, provide for the supply of fuel, and may also include a lease of the physical premises. See S. Rep. No. 95-731, at 17, 29 (1978).[2] Franchise agreements ordinarily have a specified term (*e.g.*, three years) after which they automatically expire. See, *e.g.*, C.A. App. 1412. The parties can "renew" the franchise relationship at the end of the stated term by executing a new agreement. See S. Rep. No. 95-731, at 18.

In the 1970s, Congress received "numerous complaints by franchisees of unfair terminations or non-renewals of their franchises." S. Rep. No. 95-731, at 17. In 1978, it responded by enacting the Petroleum Marketing Practices Act, Pub. L. No. 95-297, 92 Stat. 322 (codified in part as amended at 15 U.S.C. §§ 2801-2806). Rather than regulate all aspects of the franchise relationship, Congress focused on two specific events—"termination and non-renewal." S. Rep. No. 95-731, at 19. Its goal was to "define the rights and obligations of the parties to the franchise relationship in the crucial area of termination of a franchise or non-renewal of the franchise relationship." *Ibid.* Moreover, concerned about the "uneven patchwork of rules governing franchise relationships which differ

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tively non-renewed" in violation of the PMPA if it in fact renews its franchise relationship and continues to operate its franchise.

[2] Often, different aspects of the franchise relationship are set forth in separate contracts. For example, the parties may sign one contract addressing fuel supply and trademark rights and a separate contract for the lease of the premises. See, *e.g.*, C.A. App. 1334-1346, 1395-1410. Those contracts are often referred to collectively as the "franchise agreement," and we follow that convention here.

from State to State," Congress also sought to impose a "single, uniform set of rules governing the grounds for termination and non-renewal." *Ibid.*

To those ends, the PMPA contains a series of interlocking provisions that "prohibit[] a franchisor from *terminating* a franchise during the term of the franchise agreement and from *failing to renew* the relationship at the expiration of the franchise term, unless the termination or nonrenewal is based upon a ground specified or described in the legislation and is executed in accordance with the notice requirements of the legislation." S. Rep. No. 95-731, at 15 (emphasis added). To provide "certainty and uniformity in franchise relationships which permeate a nationwide motor fuel distribution and marketing network," the Act also "preempts state law in the subject areas in which the federal legislation deals, i.e., termination and non-renewal of franchise relationships." *Id.* at 16. In establishing those uniform rules for termination and non-renewal, Congress "recognize[d] the importance of providing adequate flexibility so that franchisors may initiate changes in their marketing activities to respond to changing market conditions and consumer preferences." *Id.* at 19. The Act thus strikes a careful balance between protecting franchisees and affording franchisors necessary flexibility.

B. Section 101 of the PMPA identifies the franchise agreements subject to the Act's restrictions. It defines the term "franchise" as a contract under which a refiner authorizes a retailer to use its trademark in selling motor fuel (as well as similar arrangements between refiners and wholesale distributors or between distributors and retailers). 15 U.S.C. § 2801(1)(A). The Act defines the "franchise" to include not only the agreement authorizing use of the trademark but also any agreement providing the retailer with a "supply of motor fuel" or authorizing the retailer to "occupy leased marketing premises." *Id.*

§ 2801(1)(B); S. Rep. No. 95-731, at 29. Those three elements—the right to use a trademark, to occupy premises, and to receive motor fuel—are often referred to as the "statutory elements" of a franchise. App., *infra*, 2a n.1.

Section 102 sets forth the Act's principal substantive restrictions. It states that, except as permitted by the Act, no franchisor may "(1) terminate any franchise * * * prior to the conclusion of the term, or the expiration date, stated in the franchise," or "(2) fail to renew any franchise relationship." 15 U.S.C. § 2802(a). Subsection (b)(2) sets forth permissible grounds for termination of a franchise agreement during its stated term, or for non-renewal upon expiration of that term. *Id.* § 2802(b)(2). For example, a franchisor may terminate a franchisee who fails "to exert good faith efforts to carry out the provisions of the franchise" despite appropriate warnings. *Id.* § 2802(b)(2)(B). Subsection (b)(3) lists additional grounds for non-renewal. *Id.* § 2802(b)(3). For example, a franchisor may refuse to renew a franchisee who fails "to agree to changes or additions to the provisions of the franchise" proposed by the franchisor, provided the changes were proposed "in good faith and in the normal course of business" and not "for the purpose of converting the leased marketing premises to operation by employees or agents of the franchisor." *Id.* § 2802(b)(3)(A).

Section 104 sets forth notification procedures a franchisor must follow before terminating or declining to renew a franchisee. 15 U.S.C. § 2804. Normally, the franchisor must provide written notice of its intent to terminate or not to renew a franchise "not less than 90 days prior to the date on which such termination or nonrenewal takes effect." *Id.* § 2804(a). Where 90 days' notice is impractical, the franchisor must provide notice on the earliest date on which notice is "reasonably practicable." *Id.* § 2804(b)(1). In all cases, the notice must state the franchisor's "intention to terminate the franchise or not

to renew the franchise relationship, together with the reasons therefor." *Id.* § 2804(c).

Section 105 establishes a private cause of action for violations of the Act, subject to a one-year statute of limitations. 15 U.S.C. § 2805(a). It authorizes courts to grant "such equitable relief as the court determines is necessary to remedy the effects of any failure to comply with [the Act], including declaratory judgment, mandatory or prohibitive injunctive relief, and interim equitable relief." *Id.* § 2805(b)(1). Courts are *required* to grant a preliminary injunction if (1) a franchisee has been terminated or non-renewed; (2) there are "sufficiently serious questions going to the merits to make such questions a fair ground for litigation"; and (3) the balance of hardships favors relief. *Id.* § 2805(b)(2). The franchisor has the burden of justifying any termination or non-renewal. *Id.* § 2805(c).

Section 105 also provides for monetary relief. Plaintiffs are entitled to recover actual damages and, in any case involving "willful disregard" of the Act's requirements, punitive damages. 15 U.S.C. § 2805(d)(1)(A)-(B). Plaintiffs are entitled to recover attorney's fees and expert witness fees whenever they recover more than nominal damages. *Id.* § 2805(d)(1)(C).

Finally, Section 106 addresses the PMPA's relationship to state law. To the extent the PMPA applies, "no State or any political subdivision thereof may adopt, enforce, or continue in effect any provision of any law or regulation * * * with respect to termination * * * of any such franchise or to the nonrenewal * * * of any such franchise relationship unless such provision of such law or regulation is the same as the applicable provision" of the PMPA. 15 U.S.C. § 2806(a)(1). Section 106 also clarifies that nothing in the Act "authorizes any transfer or assignment of any franchise or prohibits any transfer or assignment of any franchise" authorized by the contract or by state law. *Id.* § 2806(b)(1).

II. PROCEEDINGS BELOW

A. Background

This case arises out of franchise agreements between petitioner Shell Oil Company ("Shell") and various Shell service station operators in Massachusetts. Those franchise agreements specified a monthly "contract rent" for lease of the station premises. App., *infra*, 2a-3a. For many years, however, Shell also offered a rent reduction program (referred to by the court of appeals as a "subsidy") that reduced the amount of rent a dealer had to pay depending on the volume of gasoline sold. *Ibid.* The written program terms "explicitly provided for cancellation [of that program] with thirty days' notice." *Id.* at 3a; see, *e.g.*, C.A. App. 3533 ("Shell may, at its option, upon at least 30 days' prior notice to you, * * * discontinue the Program at the end of any month * * * ."). The franchise agreements also contained integration clauses requiring that any modification be in writing. App., *infra*, 13a.

In 1998, Shell assigned its rights and obligations under the franchise agreements to petitioner Motiva Enterprises LLC ("Motiva"), a joint venture formed by Shell, Texaco, and Saudi Refining to conduct gasoline marketing operations. See App., *infra*, 2a; C.A. App. 2476. Unlike Shell, the other joint venture partners did not offer a volume-based rent subsidy; the joint venture thus "had to evolve a uniform rent structure." App., *infra*, 57a. At the time, moreover, the "entire industry was changing the manner of computing rent." *Ibid.* Rather than basing rent on gasoline sales, the industry was "switch[ing] to a formulation based on the value of the station's real estate." *Ibid.* That shift reflected "a change in the use of gas stations from simply selling gasoline and oil to including also convenience stores and other amenities." *Ibid.*

At least in part for those reasons, the rent subsidy for the Shell dealers was gradually phased out. See App., *infra*, 57a. After substituting a transitional program for 16 months, Motiva ended the subsidy entirely on January 1, 2000. *Id.* at 2a-3a; C.A. App. 2912. In addition, consistent with the industry trend, Motiva decided to start computing rent based on the value of the station's real estate. See App., *infra*, 57a. As each dealer's franchise agreement expired by its terms over the months and years following January 1, 2000, Motiva offered a new franchise agreement that calculated rent on that revised basis. See *id.* at 21a.

B. Proceedings in the District Court

1. On June 30, 2000, six months after Motiva ended the rent subsidy, six Shell dealers and an unincorporated association named the "Shell Dealers Defense Group" filed a lawsuit against Shell and Motiva (the "*Tsaniklides*" action). App., *infra*, 3a; C.A. App. 3793, 3798-3804. None of the respondents here was a named plaintiff in that action. C.A. App. 3798. After the district court held that the Shell Dealers Defense Group lacked standing—and more than a year after Motiva ended the rent subsidy—plaintiffs moved to add respondents and approximately 70 other dealers (all of whom claimed to be members of the Shell Dealers Defense Group) as plaintiffs in the *Tsaniklides* suit. *Id.* at 3864-3875. The court denied that motion on June 12, 2001. *Id.* at 3906.

On July 27, 2001, about 18 months after Motiva ended the rent subsidy, 63 of those dealers (including respondents) filed this suit against Shell and Motiva. App., *infra*, 4a; C.A. App. 52-64.[3] The complaint acknowledged that the written program terms authorized Shell to discontinue the rent subsidy on 30 days' notice. C.A. App.

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[3] The suit alleged jurisdiction under 15 U.S.C. § 2805 and 28 U.S.C. §§ 1331 and 1367. C.A. App. 59-60.

70. But the complaint alleged that Shell sales representatives had orally promised the dealers—contrary to the express written program terms and the express prohibition on oral modification—that "the Subsidy or something like it would always exist, the contract rent was to be disregarded, and the cancellation provision was only intended to be invoked in a situation like a war or an oil embargo." App., *infra*, 3a. The suit thus claimed that Motiva's discontinuation of the rent subsidy was a breach of contract under state law. *Id.* at 4a.

The complaint also included two federal PMPA claims. Although the dealers were never actually terminated and continued to operate their Shell stations after Motiva ended the rent subsidy, they claimed that discontinuation of the rent subsidy constituted a "constructive termination" of their franchise agreements in violation of the PMPA. App., *infra*, 4a. Similarly, although the dealers in fact renewed their franchise relationships by signing new franchise agreements with Motiva when their existing agreements expired, they claimed that those new agreements constituted "constructive non-renewals" of their franchise relationships because Motiva changed the way it computed rent. *Ibid.*[4]

Shell and Motiva moved to dismiss and later moved for summary judgment, arguing (among other things) that a mere rent increase, unaccompanied by any termination of the franchise, was not actionable under the PMPA. Pltfs. C.A. Supp. App. 11-15; Def. C.A. Supp. App. 1-6. The court denied both motions, holding that the dealers had a valid claim for "constructive termination" under the PMPA. App., *infra*, 62a; C.A. App. 488-489.

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[4] Plaintiffs later added claims for bad-faith pricing under U.C.C. § 2-305, alleging that Shell and Motiva charged too much for fuel under the open price terms of their supply agreements. App., *infra*, 3a-4a; C.A. App. 319-320.

2. The district court selected eight of the 63 dealer-plaintiffs—respondents here—to proceed to trial first. C.A. App. 297.[5] A 15-day jury trial began on November 15, 2004. At trial, the dealers testified about their operations following the January 1, 2000, cancellation of the rent subsidy. Four of the eight dealers testified that they were still operating their Shell-branded service stations at the time of trial, 58 months after their alleged "constructive termination." *Id.* at 846, 897, 942, 996.

Three of the four remaining dealers testified that they continued operating their stations until after the allegedly terminated agreements expired according to their terms and the dealers signed renewal agreements with Motiva. One of those three dealers signed a new Motiva agreement and then operated the station until April 30, 2004, 52 months after the subsidy ended. C.A. App. 1009, 1372-1373. Another signed a new Motiva agreement and then operated the station until September 2001, when he sold it to a third party, 21 months after the subsidy ended. *Id.* at 992, 1390-1391. The last of the three signed a new Motiva agreement effective June 2000 and then operated the station until September 2000, when he sold it to Motiva, nine months after the subsidy ended. *Id.* at 882, 1393-1394.

The eighth dealer operated his Shell station for seven months after the rent subsidy ended. C.A. App. 2866. His son then purchased the property from Motiva so it could be converted to a garden center. *Id.* at 1077-1078. That dealer did not claim his decision to leave the service-station business had anything to do with cancellation of the rent subsidy; he had been planning to convert the station before the subsidy ended. *Id.* at 1070-1078.

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[5] The court initially selected ten dealers, C.A. App. 297, but one lost on summary judgment and another settled on the eve of trial, *id.* at 490, 805, 809-810.

Some stations were quite profitable after their alleged constructive termination. One dealer averaged more than $200,000 in net income and compensation each year from his two Shell stations (and a related towing service he operated using station employees and facilities). C.A. App. 968-971, 3556. Another station's net income doubled to $57,000 the year after the subsidy ended; in the words of its owner, it "looked pretty good profit-wise." *Id.* at 992-996, 3557. A third station earned more in 2001, two years after the subsidy ended, than in any other year since 1994. *Id.* at 856.

3. The jury found Shell and Motiva liable on all counts to all plaintiffs, awarding damages of $3.3 million ($4.3 million after prejudgment interest). C.A. App. 548-558; App., *infra*, 53a. That award included $1.3 million for constructive termination and $1.2 million for constructive non-renewal. C.A. App. 548-555.[6]

Before and after the verdict, Shell and Motiva moved for judgment as a matter of law, arguing again that the evidence failed to show constructive termination or non-renewal. Pltfs. C.A. Supp. App. 118-122, 156-179. "[O]nly the act of termination or nonrenewal * * * gives rise to a PMPA claim," they argued, and thus "'[t]he plain language of the statute contemplates an actual ending of the franchise relationship.'" *Id.* at 156. That limitation precluded the PMPA claims, they urged, because respondents "remained in operation." *Id.* at 158. The district court denied the motion. App., *infra*, 58a-59a.[7]

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[6] The other $0.8 million related to the state-law claims for bad-faith pricing. C.A. App. 556-557. The jury also awarded $1.3 million for breach of contract, but those damages were not separate from the damages for constructive termination. See *id.* at 548-553; App., *infra*, 29a n.16; see also p. 28 n.10, *infra*.

[7] The district court also rejected Shell and Motiva's argument that the PMPA claims were untimely, holding that the suit "relate[d]

The district court then awarded plaintiffs "attorneys' fees and expert witness fees pursuant to the Petroleum Marketing Practices Act." Def. C.A. Br. Add'm 27. Noting that "[t]he PMPA provides that a franchisee who prevails in an action under the statute is entitled to 'reasonable attorney and expert witness fees,'" the court awarded $1.16 million in attorney's fees and $209,000 in expert witness fees. *Id.* at 28-29, 42. The court entered a final judgment on respondents' claims under Federal Rule of Civil Procedure 54(b). App., *infra*, 34a-35a.

C. Proceedings in the Court of Appeals

1. The court of appeals affirmed in part and reversed in part. App., *infra*, 1a-33a. Addressing respondents' "constructive termination" claims, the court held that there was sufficient evidence that cancellation of the rent subsidy amounted to a constructive termination of the dealers' franchise agreements. *Id.* at 15a-21a. To establish "constructive termination," the court ruled, a franchisee must prove that "the franchisor breached one of the three statutory components of the franchise agreement"—namely, "the contract to use the refiner's trademark, the contract for the supply of motor fuel, or the lease of the premises." *Id.* at 16a. The court found that test met because "the Dealers have proven to the jury's satisfaction that Motiva breached the lease component of the franchise agreements" by discontinuing the subsidy, thereby "allow[ing] the jury to find that Shell constructively terminated the Dealers' franchises." *Id.* at 17a.

The court rejected the argument that a breach of contract cannot amount to a termination under the PMPA where, as here, the plaintiff continues to operate its fran-

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back" to the earlier *Tsaniklides* suit. App., *infra*, 58a-62a; Pltfs. C.A. Supp. App. 186-187. The court also rejected challenges to the state-law claims and the damages awards. See App., *infra*, 58a-59a; Pltfs. C.A. Supp. App. 144-156, 179-184, 187-189.

chise using the defendant's trademark, fuel, and premises. App., *infra*, 17a. Relying on *Barnes* v. *Gulf Oil Corp.*, 795 F.2d 358 (4th Cir. 1986), the court held that the breach of the franchise agreement "does not have to be a total breach" and "need not result in complete deprivation of a statutory element of the franchise to support a constructive termination" claim. App., *infra*, 18a-19a. Although the court did not hold that "any material breach of the lease would necessarily be sufficient," it stated that the district court had set an "appropriate threshold" by instructing the jury that "it could find constructive termination only if the breach of the lease 'was such a material change that it effectively ended the lease, even though the plaintiffs continued to operate the business.'" *Id.* at 18a.

The court acknowledged that its ruling was inconsistent with the concept of "constructive" termination in other areas of the law. App., *infra*, 18a. In other contexts, the court recognized, plaintiffs claiming "constructive" termination must still show an "actual severance of the relationship." *Ibid.* For example, an employee claiming constructive discharge "must leave the workplace," and a tenant claiming constructive eviction "must move out." *Ibid.* But the court held that service station franchisees are different because "sunk costs, optimism, and the habit of years might lead franchisees to try to make the new arrangements work, even when the terms have changed so materially as to make success impossible." *Ibid.* "To require an actual abandonment of years of work and investment before we recognize a right of action under the PMPA would be unreasonable." *Ibid.*

2. Turning to the constructive non-renewal claims, the court of appeals reached the opposite conclusion. App., *infra*, 21a-25a. The court noted that most circuits do not allow a dealer to claim non-renewal (constructive or otherwise) under the PMPA where the dealer actually

renews its franchise. *Id.* at 22a-23a. As those courts have explained, the PMPA includes elaborate provisions that require 90 days' advance notice for non-renewal and authorize courts to grant preliminary injunctive relief. *Ibid.* A dealer confronting objectionable contract terms can thus refuse to sign the new agreement, triggering a notice of non-renewal. *Id.* at 23a. The dealer can then bring suit during the 90-day notice period and seek a preliminary injunction to preserve the status quo while the court determines the legality of the franchisor's proposed renewal terms. *Ibid.* That framework affords franchisees and franchisors a measure of certainty in short order. By contrast, "[a]llowing a franchisee to sign 'under protest' and then later challenge the renewal would extend the period of uncertainty through the entire first year of a contract." *Id.* at 24a.

Accordingly—despite having ruled that dealers can claim constructive *termination* even where they continue to operate the franchise—the court held that a dealer cannot claim constructive *non-renewal* "where the franchisee has signed and operates under the renewal agreement complained of." App., *infra*, 25a. "[J]ust as the PMPA requires a clear indication from franchisors that they seek nonrenewal of a franchise relationship, it likewise requires that franchisees faced with objectionable contract terms refrain from ratifying those terms by executing the contracts (even 'under protest') and operating under them." *Id.* at 24a. The court of appeals thus reversed the judgment on the constructive non-renewal claims. *Id.* at 25a. In addition, because "[t]he award of attorneys' fees [wa]s mandated by the PMPA" and the court was "uphold[ing] only one of the two [PMPA]

claims," the court remanded for recalculation of the fee award. *Id.* at 32a-33a.[8]

3. The court of appeals denied rehearing and rehearing en banc on May 23, 2008. App., *infra*, 64a-66a. On August 14, 2008, Justice Souter extended the time to file a petition for a writ of certiorari to and including September 20, 2008.

REASONS FOR GRANTING THE PETITION

The decision in this case exacerbates a division of circuit authority on an issue of critical importance to petroleum refiners and their service-station franchisees alike. The Petroleum Marketing Practices Act provides that a refiner may not "terminate" a franchise except on particular grounds following specified procedures. 15 U.S.C. § 2802(a)(1). In the decision below, the First Circuit held that the PMPA permits claims for "constructive termination" even where the franchisee continues to operate its franchise—occupying the same premises, receiving the same gasoline, and using the same trademark. Although that ruling is consistent with the Fourth Circuit's construction of the Act, it squarely conflicts with decisions of

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[8] The court of appeals rejected all of Shell and Motiva's remaining arguments. With respect to the statute of limitations, the court acknowledged that the suit was filed after the one-year limitations period had expired. App., *infra*, 8a. It also conceded that "the letter of Rule 15," which governs when one filing "relates back" to a prior filing, was "not met here." *Id.* at 10a. Nonetheless, the court of appeals held that the district court had discretion to allow the suit to relate back to the earlier *Tsaniklides* suit filed by other plaintiffs in June 2000. *Id.* at 10a-12a. The court also rejected the argument that the amount of damages was unsupported by the evidence. *Id.* at 29a-33a. It admitted that "the expert's figures were probably too high," but found that defect irrelevant, opining: "A clock that is five minutes fast is, strictly speaking, wrong. But it still may give a general sense of the time and thereby serve its purpose." *Id.* at 29a-30a. Finally, the court affirmed the judgment on the state-law breach-of-contract and bad-faith pricing claims. *Id.* at 13a-15a, 25a-28a.

the Sixth and Ninth Circuits, which hold that a dealer cannot claim it was "constructively terminated" under the PMPA if it continues to operate its franchise.

The First and Fourth Circuits' decisions cannot be reconciled with the statutory text, which addresses "termination" of franchises, not mere breaches of ongoing franchise agreements. Those decisions improperly federalize a vast swath of disputes traditionally governed by state contract law. And the circuit conflict defeats one of Congress's primary goals in enacting the PMPA: to establish a "single, uniform set of rules governing * * * termination and non-renewal." S. Rep. No. 95-731, at 19 (1978). The conflict thus does not merely undermine the general principle that federal rights and obligations ought not vary with the happenstance of where a suit is filed. It defeats Congress's intent by imposing precisely the patchwork of inconsistent regional standards that Congress sought to eliminate.

I. THE CIRCUITS ARE DIVIDED OVER WHETHER A PLAINTIFF THAT CONTINUES TO OPERATE ITS FRANCHISE CAN CLAIM "CONSTRUCTIVE TERMINATION" UNDER THE PMPA

The PMPA defines a petroleum franchise in terms of three elements—use of a trademark, supply of motor fuel, and occupancy of the premises. 15 U.S.C. § 2801(1). Consistent with that definition, courts of appeals generally agree that a franchisor's conduct cannot amount to "constructive termination" unless "the franchisor breached one of th[ose] three statutory components." *May-Som Gulf, Inc.* v. *Chevron U.S.A., Inc.*, 869 F.2d 917, 922 (6th Cir. 1989).[9] The courts of appeals, however,

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[9] Courts have also allowed constructive termination claims where a franchisor assigns a franchise in violation of state law. See *May-Som*, 869 F.2d at 922. The theory is that the "unexpired portion of a franchise that has been invalidly assigned is no longer a franchise as

disagree sharply over whether a plaintiff can claim it was "constructively terminated" if it continues to operate as a franchisee—using the defendant's trademark, fuel, and premises—despite the alleged breach.

A. The Courts of Appeals Are Squarely Divided

1. At least two courts of appeals have held that "constructive termination" requires severance of the franchise relationship—*i.e.*, that there can be no constructive termination if the dealer continues to operate, occupying the same premises, receiving the same fuel, and using the same trademark. In *Portland 76 Auto/Truck Plaza, Inc.* v. *Union Oil Co. of California*, 153 F.3d 938 (9th Cir. 1998), for example, the dealer (Portland 76) claimed that Unocal had constructively terminated its franchise by assigning the agreement to another entity that "charged more for fuel." *Id.* at 948. The Ninth Circuit rejected that claim. "For the assignment to have amounted to a constructive termination," the court held, "it would have had to *force Portland 76 out of its business* * * *." *Ibid.* (emphasis added). That was fatal to Portland 76's claim because the dealer had "stayed in business until the time came for renewal." *Ibid.*; see also *Little Oil Co.* v. *Atl. Richfield Co.*, 852 F.2d 441, 444-445 (9th Cir. 1988).

The Sixth Circuit reached the same result in *Clark* v. *BP Oil Co.*, 137 F.3d 386 (6th Cir. 1998). The dealer there claimed that the franchisor had breached the franchise agreement by charging more for fuel than the contract allowed. *Id.* at 391-392. Observing that "[t]he PMPA does not exist to redress every breach of an agreement between a gasoline station franchisee and franchisor," the court refused to equate the breach of a

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defined by the Act." *Barnes* v. *Gulf Oil Corp.*, 795 F.2d 358, 363 (4th Cir. 1986). That theory is not at issue here: The court of appeals did not suggest that Shell's assignment of the franchises to Motiva was invalid under state law.

contractual duty to provide fuel *at a particular price* with constructive termination. *Ibid.* Because the dealer "d[id] not claim that [the refiner] *refuses* to supply him with gasoline," the court explained, the alleged breach did not implicate the PMPA. *Id.* at 391 (emphasis added). The dealer was still a franchisee, receiving the three statutory elements of his franchise: "[E]ven if Clark can establish a breach of the price term, it does not trigger the protections of the PMPA since he still retains use of BP's trademark, use of the Emerald-Mart premises, and continues to receive BP-branded motor fuel." *Id.* at 392.

The Fifth and Eleventh Circuits have signaled their agreement with that interpretation. In *McGinnis* v. *Star Enterprise*, No. 93-1234, 1993 WL 455587 (5th Cir. Oct. 21, 1993) (unpublished opinion), the Fifth Circuit stated in dicta that "[t]he plain meaning of the statute does not provide for 'constructive termination,'" and refused to allow a claim where the plaintiff "continued as a franchisee" at all relevant times. *Id.* at *4; see also *Abrams Shell* v. *Shell Oil Co.*, 343 F.3d 482, 486-488 (5th Cir. 2003) (noting that issue has not been conclusively resolved); *April Mktg. & Distrib. Corp.* v. *Diamond Shamrock Ref. & Mktg. Co.*, 103 F.3d 28, 29-31 & n.2 (5th Cir. 1997) (same). And in *Shukla* v. *BP Exploration & Oil, Inc.*, 115 F.3d 849 (11th Cir. 1997), the Eleventh Circuit "question[ed]" whether a franchisor could violate the PMPA by charging more for fuel than the contract allowed, observing that the dealer had "not alleged that [the assignee] *refused* to supply him with gasoline," only that it supplied gasoline "at [an] increased price." *Id.* at 853-854 (emphasis added).

Those decisions make sense. The PMPA by its terms provides only that a refiner may not "*terminate* any franchise" except on particular grounds following specified procedures. 15 U.S.C. § 2802(a)(1) (emphasis added). Aside from clarifying that "[t]he term 'termination' in-

cludes cancellation," the Act does not define "terminate." *Id.* § 2801(17). "When terms used in a statute are undefined, [courts] give them their ordinary meaning." *Asgrow Seed Co.* v. *Winterboer*, 513 U.S. 179, 187 (1995). The ordinary meaning of "terminate" is to "put an end" to something. *Black's Law Dictionary* 1511 (8th ed. 2004); see also *Webster's New International Dictionary of the English Language* 2605 (2d ed. 1954) (same); *id.* at 389 (cancel: "[t]o annul or destroy"). Thus, as a matter of plain text, a plaintiff who continues to do business as a franchisee of the defendant—occupying the same premises, receiving the same fuel, and using the same trademark—has not been "terminated."

The same would be true even if one construed the Act to reach "constructive" terminations. Nothing in the Act expressly extends its coverage that far. But even if Congress meant to incorporate that concept, a "constructive" termination still requires an end to the relationship. An *actual* termination takes place when the terminating party expressly ends a relationship. A *constructive* termination occurs where one party imposes conditions so onerous that its counterparty has no choice but to end the relationship. In both cases, however, the relationship actually ends.

In the employment context, for example, there can be no "constructive" termination absent an end to the relationship: "An employee claiming constructive discharge must actually leave employment." 1 B. Lindemann & P. Grossman, *Employment Discrimination Law* 1449 (4th ed. 2007); see also *Pennsylvania State Police* v. *Suders*, 542 U.S. 129, 141-143, 148 (2004); 2 *EEOC Compliance Manual* § 612.9(a) (2002); 1 M. Rothstein *et al.*, *Employment Law* § 2.10, at 218-219 (3d ed. 2004). Similarly, a tenant claiming "constructive eviction" must actually "abandon the premises." 49 Am. Jur. 2d *Landlord and Tenant* § 518, at 524 (2006); see also 52A C.J.S. *Landlord*

& Tenant § 968, at 363 (2003). Thus, a termination can be "constructive" in those contexts in the sense that the employee quits or the tenant moves out because of unbearable conditions, rather than being expressly ordered out by the employer or landlord. But, as the court below acknowledged, there still must be an "actual severance of the relationship": "The employee must leave the workplace; the tenant must move out." App., *infra*, 18a.

Consequently, even assuming that a claim for "constructive" termination exists, "[t]he accurate analogy in the PMPA context * * * would be to a franchisee who shut down its station because the franchisor caused conditions so onerous that the franchisee could not continue in business." *Abrams Shell* v. *Shell Oil Co.*, 216 F. Supp. 2d 634, 641 (S.D. Tex. 2002), aff'd on other grounds, 343 F.3d 482. A plaintiff who continues to operate his franchise—using the same trademark, receiving the same fuel, and occupying the same premises—has not been "constructively terminated" in any sense of the term.

2. Nonetheless, two courts of appeals, including the First Circuit below, have held that a breach of the franchise agreement can amount to a constructive termination even if the dealer continues to operate its franchise. The Fourth Circuit adopted that view in *Barnes* v. *Gulf Oil Corp.*, 795 F.2d 358 (4th Cir. 1986). The plaintiff there claimed that Gulf had "constructively terminated" her franchise by assigning it to an entity that "increase[d] [her] cost of gasoline over the franchise's stipulated price." *Id.* at 359. Like the Ninth Circuit in *Portland 76*, the district court rejected the suit, holding that Gulf "did not terminate the franchise because Barnes was still in business as a Gulf retailer." *Id.* at 360. But the Fourth Circuit reversed. Without disputing that Barnes was still a franchisee, the Fourth Circuit held that a plaintiff "can obtain relief under the Act if [it] can no longer obtain gasoline at the stipulated franchise price."

Id. at 362. "One of Congress's purposes in adopting the Act," the court declared, "was to protect franchisees from overbearing, burdensome conduct by the franchisor during the term of the franchise." *Ibid.*

Relying on *Barnes*, the First Circuit in this case similarly held that a dealer can claim "constructive termination" even if it continues to operate its franchise. The court expressly rejected the argument that "actual severance of the relationship" is required. App., *infra*, 18a. Instead, the court held that the breach of the franchise agreement "does not have to be a total breach" and "need not result in complete deprivation of a statutory element of the franchise to support a constructive termination" claim. *Id.* at 18a-19a. Such claims are viable, the court stated, "'even though the plaintiffs continued to operate the business.'" *Id.* at 18a. Indeed, the court sustained the verdict in this case even as to the four plaintiffs who were still operating their Shell stations at the time of trial, nearly five years after their purported constructive termination. See pp. 10-11, *supra*. "To require an actual abandonment of years of work and investment," the court opined, would be "unreasonable." App., *infra*, 18a.

The First and Fourth Circuits' holdings are irreconcilable with those of the Sixth and Ninth Circuits. Under the Ninth Circuit's *Portland 76* decision, the constructive termination claims here and in *Barnes* would have failed because "[t]he assignment did not force [plaintiffs] out of business"—rather, plaintiffs "stayed in business" despite the alleged breach of the franchise agreement. *Portland 76*, 153 F.3d at 948. The Sixth Circuit would have rejected these claims, too, because the alleged breach of a contractual duty to lease premises *at a particular price* did not deprive plaintiffs of their use of the premises: "[E]ven if [plaintiffs] can establish a breach of the price term, * * * [they] still retain[] use of [Shell's] trademark, use of the [station] premises, and continue[] to receive

[Shell]-branded motor fuel." *Clark*, 137 F.3d at 392. This Court should grant the petition to resolve that conflict.

B. The Circuit Conflict Reflects Broader Disarray

That square circuit conflict, moreover, reflects broader disagreement. Like the courts of appeals, district courts across the country routinely address this issue with divergent results. Some reject constructive termination claims where the plaintiff continues to operate its franchise. See *Jet, Inc.* v. *Shell Oil Co.*, No. 02 C 2289, 2002 WL 31641627, at *3-5 (N.D. Ill. Nov. 22, 2002) ("The plain language of the statute contemplates an actual ending of the franchise relationship * * * ."), aff'd on other grounds, 381 F.3d 627 (7th Cir. 2004); *Deamor, Inc.* v. *Mobil Oil Corp.*, No. 90-2227, 1990 WL 124927, at *1 (E.D. Pa. Aug. 23, 1990) ("[T]here can be no constructive termination where, as here, plaintiff still operates his Mobil franchise."); see also *Meghani* v. *Shell Oil Co.*, 115 F. Supp. 2d 747, 755-760 (S.D. Tex. 2000) (questioning constructive termination theory and refusing to extend it), aff'd mem., No. 00-20868, 2001 WL 1066697 (5th Cir. Aug. 13, 2001); *Abrams Shell*, 216 F. Supp. 2d at 637-642 (same). Other courts follow the First and Fourth Circuits' approach, allowing constructive termination claims even where a franchisee continues to operate. See, *e.g.*, *Charleston West 76 Auto/Truckstop, Inc.* v. *Nat'l Auto/Truckstops, Inc.*, No. 3:97-cv-25, 1997 WL 528491, at *2-7 & n.8 (N.D. W. Va. May 21, 1997).

That same confusion also pervades cases arising under the PMPA's parallel provisions governing non-renewal. As explained above, the Act regulates both "termination" (ending a franchise agreement during its stated term) and "non-renewal" (refusing to renew the relationship by offering a new contract when the old one expires). See pp. 3-5, *supra*. Just as courts are divided on whether a dealer can claim "constructive termination" if he contin-

ues to operate his franchise, so too courts are divided on whether a dealer can claim "constructive non-renewal" if he continues the franchise relationship by signing a renewal agreement. The Ninth Circuit allows such claims. See *Pro Sales, Inc.* v. *Texaco, U.S.A.*, 792 F.2d 1394, 1398-1400 (9th Cir. 1986). But the Seventh and Fifth Circuits do not. See *Dersch Energies, Inc.* v. *Shell Oil Co.*, 314 F.3d 846, 858-867 (7th Cir. 2002); *Abrams Shell*, 343 F.3d at 488-489 & n.16. And in this case, the First Circuit adopted the majority rule. App., *infra*, 21a-25a.

Those outcomes are not merely inconsistent. They are incoherent. For example, a plaintiff in the *First Circuit* who continues to operate his franchise and signs renewal papers can claim constructive termination to challenge a breach of his old agreement, but not constructive non-renewal to challenge his new one. Compare App., *infra*, 15a-21a with *id.* at 21a-25a. By contrast, a plaintiff in the *Ninth Circuit* who continues to operate his franchise and signs renewal papers *cannot* claim constructive termination to challenge a breach of his old agreement, but *can* claim constructive non-renewal to challenge his new one. Compare *Portland 76*, 153 F.3d at 948, with *Pro Sales*, 792 F.2d at 1398-1400. And plaintiffs in the Northern District of Illinois can claim neither. See *Jet*, 2002 WL 31641627, at *3-5; *Dersch*, 314 F.3d at 858-867.

The decision below reflects that utter disarray. In holding that constructive *non-renewal* is not actionable where the plaintiff renews its relationship, the First Circuit relied on cases that expressly rejected the Ninth Circuit's holding in *Pro Sales* that such claims are viable. App., *infra*, 22a-23a. But when it addressed the issue of constructive *termination*, the First Circuit relied on *Pro Sales* as authority for allowing such claims even where the dealer continues to operate. See *id.* at 18a. It did so even though *Pro Sales* addressed only constructive non-renewal, and even though the Ninth Circuit decision that

addressed constructive termination—*Portland 76*—rejected such claims. That makes no sense whatsoever. This Court should grant the petition to bring uniformity and rationality to this area of the law.

II. The Question Presented Is A Matter Of National Importance

The need for resolution of the circuit conflict here is especially compelling. The issue is recurring. It has a profound impact on myriad franchisors and tens of thousands of franchisees during a critical period of industry restructuring. And the conflict undermines one of Congress's central goals in enacting the PMPA—to establish uniform rules governing termination and non-renewal for this nationwide industry.

A. The Circuit Conflict Undercuts One of Congress's Core Goals in Enacting the PMPA

One of Congress's primary goals in enacting the PMPA was to provide "certainty and uniformity" in the "nationwide motor fuel distribution and marketing network" by replacing an "uneven patchwork" of state laws with a "single, uniform set of rules governing the grounds for termination and non-renewal." S. Rep. No. 95-731, at 16, 19. The circuit conflict utterly destroys that goal: Certainty and uniformity are a mirage where the scope of federal law varies from one circuit to the next. In the ordinary case, a conflict warrants review because parties should not receive different treatment under federal law based on the happenstance of where they reside. Here, the conflict also defies Congress's express intent to create a "single, uniform" national standard for termination and non-renewal.

That conflict, moreover, concerns an issue at the heart of the PMPA. Congress enacted the statute to "protect[] * * * franchisees from arbitrary or discriminatory *termination or non-renewal* of their franchises," following

"complaints by franchisees of unfair *terminations or non-renewals*." S. Rep. No. 95-731, at 15, 17 (emphasis added). The Act is directed narrowly to that issue: It restricts a franchisor's right to "terminate" or "fail to renew" a franchise, but does not otherwise regulate the franchise relationship. 15 U.S.C. § 2802(a). Precisely what constitutes "termination" is thus a fundamental issue—indeed, *the* fundamental issue—under the Act.

B. The Decision Below Profoundly Affects the Federal-State Balance

By expanding the Act's coverage, the First and Fourth Circuits' decisions also federalize a large category of disputes formerly governed by state contract law. "[T]he regulation of petroleum franchise relationships has traditionally been a matter of local concern in which the parties frame their relationships with reference to State law." *Dersch*, 314 F.3d at 861. The PMPA limits federal intrusion by preempting inconsistent state laws *only* when they regulate "termination" or "nonrenewal." 15 U.S.C. § 2806(a). "State laws dealing with [other] aspects of the relationship are not preempted." S. Rep. No. 95-731, at 42. By expanding what constitutes a "termination," the decision below expands the PMPA's preemptive scope as well, displacing traditional state authority.

The court of appeals purported not to convert every breach of contract into a constructive termination. App., *infra*, 18a. But the standard it articulated was unintelligible: It held that the breach must be "'such a material change that it effectively ended the lease, even though the plaintiffs continued to operate the business.'" *Ibid.* Nowhere did the court explain how a breach could "effectively end[]" a franchise when the plaintiff "continue[s] to operate" it. That incoherent standard allows dealers to allege PMPA claims in virtually any contract dispute. Indeed, if the record supports a finding of "constructive

termination" here—where dealers were still operating their Shell stations at the time of trial five years later and earning up to $200,000 a year doing so—it is hard to imagine a case where it would not.

The First and Fourth Circuits' approach not only aggrandizes federal authority at the expense of the States, but also distorts the resolution of franchise contract disputes. The PMPA provides remedies for wrongful termination and non-renewal that are not normally available under state contract law, including punitive damages, attorney's fees, and expert witness fees. 15 U.S.C. § 2805(d)(1)(B)-(C). Those additional remedies create incentives for plaintiffs to recharacterize ordinary contract disputes as federal PMPA cases. Here, for example, plaintiffs recovered $1.3 million on their state-law contract claims, but received an additional $1.16 million in attorney's fees and $209,000 in expert witness fees by recharacterizing their rent grievances as federal PMPA claims. See pp. 11-12 & n.6, *supra*. "[T]he PMPA was not designed to provide franchisees with a federal forum for the resolution of run-of-the-mill contract disputes * * * ." *Dersch*, 314 F.3d at 862. But the First and Fourth Circuits' approach steers precisely such disputes into federal court.

This case illustrates the impact. It involves several dozen dealers suing Shell and Motiva in federal court for what amounts, in substance, to a contract dispute over whether Shell and Motiva breached alleged oral modifications to their franchise agreements. This logjam of lawsuits may have been a plausible candidate for state court—indeed, plaintiffs prevailed on a number of state-law claims. See p. 11 n.6, *supra*. But nothing in the PMPA suggests that a grievance that never caused the plaintiff's franchise agreement to end amounts to a "termination" claim that should be litigated in federal court.

C. The Issue Is Important to Refiners and Franchisees Across the Country

Finally, the impact on refiners and franchisees alike is difficult to overstate. There are nearly 165,000 service stations in the United States, see Nat'l Petroleum News, *MarketFacts 2007*, at 92 (2007), approximately 70,000 of which are run by independent dealers under franchise agreements governed by the PMPA, see 2 PriceWaterhouseCoopers, *The Economic Impact of Franchised Businesses* 134 (2008). Moreover, because the Act also applies to relationships between refiners and wholesale distributors, see 15 U.S.C. § 2801(1)(A), that figure greatly understates the number of relationships covered.

Because of the circuit split, the rights of tens of thousands of franchisees now vary from jurisdiction to jurisdiction. Refiners operating nationwide, meanwhile, face a regime in which decisions that do not even implicate the PMPA in one circuit can lead to hundreds of federal lawsuits in another. This case alone involves several dozen plaintiffs whose claims remain to be tried. See pp. 8-10, *supra*. Similar multi-plaintiff cases are pending in which New Hampshire and Rhode Island dealers allege the same PMPA claims based on cancellation of the rent subsidy. See App., *infra*, 4a. And Shell and other refiners have faced a variety of other "constructive termination" claims across the country. See pp. 16-24, *supra*.

That threat of litigation comes at a critical time. Refiners have undertaken restructurings at a "remarkable rate" in response to changing market conditions. See Energy Info. Admin., *Restructuring: The Changing Face of Motor Gasoline Marketing* 1-10, 18-19 (2001). As the cases cited above make clear, those restructurings (and the franchise assignments they often entail) are fertile grounds for contract disputes. The First and Fourth Circuits' decisions threaten to transform all of those disputes into federal PMPA cases.

III. THIS CASE IS AN IDEAL VEHICLE FOR REVIEW

This case squarely presents whether a franchisee can claim it was "terminated" within the meaning of the PMPA even though it continues operating its franchise. The court of appeals thoroughly addressed the issue in a published opinion following a full trial on the merits. That decision finally resolved all eight respondents' claims.[10] And the issue could not be presented more starkly: Seven of the eight respondents continued operating their Shell stations at all relevant times following the alleged constructive termination of their franchise agreements.[11] And the one who ended his franchise

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[10] Although the First Circuit remanded for a recalculation of attorney's fees, see pp. 14-15, *supra*, no fees at all would be payable if the Court were to grant review and reverse the judgment; the PMPA constructive termination claims are the sole remaining basis for any fee award. See pp. 12, 14-15, *supra*. Nor does the remand for fee proceedings affect the finality of the judgment below. See *Budinich* v. *Becton Dickinson & Co.*, 486 U.S. 196 (1988). The fee proceedings, moreover, would not illuminate the issues before the Court, and review at this time is appropriate because the Court's judgment could "serve to hasten or finally resolve the litigation" by rendering the fee proceedings unnecessary. E. Gressman *et al.*, *Supreme Court Practice* 282 (9th ed. 2007). This Court often grants review to decide whether attorney's fees are recoverable despite remands to determine the appropriate amount. See, *e.g.*, *Alyeska Pipeline Serv. Co.* v. *Wilderness Soc'y*, 421 U.S. 240, 241, 246 (1975); *N.C. Dep't of Transp.* v. *Crest Street Cmty. Council, Inc.*, 479 U.S. 6, 11 (1986).

[11] Four respondents were still operating their Shell stations at the time of trial. See p. 10, *supra*. Three additional respondents continued operating their Shell stations until after the agreements that were alleged to have been constructively terminated ran their course, expiring at the end of their stated terms. See *ibid.* Although those three franchisees renewed their relationships by executing new agreements and brought constructive *non-renewal* claims based on those new agreements, they made clear that their constructive *termination* claims related solely to the franchise agreements in effect when the rent subsidy ended. Pltfs. C.A. Br. 40 n.29. This

agreement early never claimed his decision had anything to do with the cancellation of the rent subsidy that allegedly constituted a constructive termination. See p. 10, *supra*. The case thus presents an ideal fact pattern.

Finally, as explained above, see pp. 22-23, *supra*, the courts of appeals are also divided over whether a dealer can claim it was "constructively non-renewed" if it signs a new franchise agreement. Respondents have filed a petition for a writ of certiorari from the judgment below, asking the Court to review that issue (No. 08-240). To the extent that petition warrants review, this petition certainly does as well, and granting both petitions would allow the Court to address circuit splits on constructive termination and constructive non-renewal together in one case. The issues are closely related, and it would plainly be more efficient for the Court to address both at once. This case presents an opportunity to do so.

IV. THE FIRST CIRCUIT'S DECISION IS INCORRECT

Finally, the First Circuit's decision is simply wrong. As explained above, nothing in the PMPA's text covers "constructive" terminations. See pp. 18-19, *supra*. And even if Congress meant to encompass that concept, the Act would still require an actual end to the franchise before a plaintiff could bring such a claim. As the First Circuit conceded, constructive discharge and constructive eviction both require an end to the relationship—the employee must quit; the tenant must move out. See pp. 19-20, *supra*. There is no basis for a different result for constructive termination under the PMPA.

The First Circuit defended its atextual construction on the ground that "sunk costs, optimism, and the habit of

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Court, of course, would not be required to decide whether any particular dealer was constructively terminated. That issue could be addressed under the proper standard articulated by this Court by the First Circuit or district court following any remand.

years might lead franchisees to try to make the new arrangements work," and thus "[t]o require an actual abandonment of years of work and investment * * * would be unreasonable." App., *infra*, 18a. But "sunk costs, optimism, and the habit of years" surely lead many longtime employees or tenants to "try to make the new arrangements work" as well. The First Circuit never explained why the law should require a poor immigrant to become homeless before claiming constructive eviction, but not require the owner of a chain of service stations to end his franchise before claiming constructive termination. Service station operators, moreover, have a panoply of remedies under state contract law to protect them from breaches short of termination—indeed, plaintiffs successfully invoked those remedies here. See p. 11 n.6, *supra*. In any event, the First Circuit did not explain how policy concerns about "sunk costs, optimism, and the habit of years" could transform a statute that was expressly and intentionally limited to "termination" and "non-renewal" into one that covers breaches not amounting to either.

The First Circuit's expansive view is particularly inappropriate because it displaces traditional state authority. "[U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance." *United States* v. *Bass*, 404 U.S. 336, 349 (1971). The "regulation of petroleum franchise relationships" is an area of "traditionally * * * local concern." *Dersch*, 314 F.3d at 861. Congress carefully confined federal intrusion into that area by targeting the PMPA to "termination" and "nonrenewal." 15 U.S.C. § 2806(a)(1). By construing the Act loosely to cover a range of ordinary contract breaches that do not end the franchise, the First Circuit expands federal preemption, significantly altering the traditional federal-state balance in this area. That is yet another reason to reject its construction.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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SEPTEMBER 2008

APPENDIX

APPENDIX A
IN THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 05-2771

FRANCIS MARCOUX, ET AL.,
Plaintiffs,

MAC'S SHELL SERVICE, INC.; CYNTHIA KAROL; JOHN A. SULLIVAN; AKMAL, INC.; SID PRASHAD; RAM CORPORATION, INC.; J&M AVRAMIDIS, INC.; THREE K'S, INC.; STEPHEN PISARCZYK,
Plaintiffs-Appellees,

v.

SHELL OIL PRODUCTS COMPANY LLC; MOTIVA ENTERPRISES LLC; SHELL OIL COMPANY, INC.,
Defendants-Appellants.

United States Court of Appeals,
First Circuit.

Heard Sept. 14, 2007
Decided April 18, 2008

Before TORRUELLA, HOWARD, Circuit Judges, and DELGADO-COLÓN,* District Judge.

HOWARD, Circuit Judge.

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* Of the District of Puerto Rico, sitting by designation.

Defendants-appellants Shell Oil Company, Shell Oil Products Company (collectively, "Shell"), and Motiva Enterprises appeal jury verdicts against them on several claims relating to their treatment of plaintiffs-appellees (the "Dealers"), franchisees and operators of Shell-branded service stations. Shell and Motiva (together, "the defendants") challenge the legal basis for verdicts against them under a federal statute designed to protect franchisees, as well as the verdicts under Massachusetts state law. Additionally, they appeal the jury's damages determinations as without sufficient basis in the evidence. We affirm in part and reverse in part.

Facts

We recite the facts in the light most favorable to the jury's verdict. *See Rodriguez-Torres v. Caribbean Forms Mfr., Inc.*, 399 F.3d 52, 56 (1st Cir. 2005).

Shell maintained a network of franchisees in Massachusetts. Plaintiffs were eight of these franchisees. In 1998, Shell, Texaco, and Star Enterprises formed defendant Motiva, and Shell transferred the franchise relationships to that entity, assigning its rights and duties under the relevant contracts to Motiva.[1] Shortly thereafter, Motiva replaced the Variable Rent Program ("VRP") with the Special Temporary Incentive Program ("STIP"). Each of these programs (collectively, the "Subsidy") provided for reduction of the contract rent through sales of gasoline; once the specified threshold gallonage was sold in a given month, the contract rent for the next month

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[1] The Petroleum Marketing Practices Act, 15 U.S.C. §§ 2801-2806 (the "PMPA"), defines "franchise" as the collection of agreements relating to three elements: the lease of the premises, the license to use the franchisor's trademark, and the agreement governing the supply of branded motor fuel. *Id.* § 2801(1). These three elements are sometimes referred to as the "statutory elements of the franchise."

would be discounted by a certain amount for every gallon sold in excess of that threshold. The threshold amount and the discount amount changed from time to time. The Subsidy had been in effect since 1982; it was renewed in an annual notice to franchisees, although its terms explicitly provided for cancellation with thirty days' notice. Various representations were made to the Dealers to the effect that the Subsidy or something like it would always exist, the contract rent was to be disregarded, and the cancellation provision was only intended to be invoked in a situation like a war or an oil embargo. Nevertheless, having given the required notice, Motiva ended the STIP on January 1, 2000, terminating the Subsidy. Without the Subsidy, the Dealers paid much more rent.

Motiva also offered new leases as the old leases expired. The new leases calculated rent differently than the old leases, resulting in a further increase in rent.

In accordance with their fuel supply contracts, the Dealers were charged a wholesale price for gasoline known as the Dealer Tank Wagon price (the "DTW price"). The fuel supply contracts were open price term contracts: the contracts were silent as to price, and one party set the price unilaterally. This price was set by the defendants, who calculated it by assessing the street prices of other competing gasoline stations in the area, and reducing those prices by the taxes levied on gasoline and an Estimated Industry Margin to approximate the wholesale price of the defendants' competitors.

Proceedings Below

Several franchisees, along with an unincorporated association called the Shell Dealers Defense Group (the "Defense Group"), filed for injunctive and declaratory relief as well as damages on June 6, 2000. Compl., *Tsaniklides v. Shell Oil Products Co.*, 00-CV-11295. When the Defense Group was found to lack standing, a motion was

made to add its members as individual plaintiffs. In denying that motion the district court indicated in a margin order, "[P]laintiffs may file a new case which may be deemed to be related." The individual franchisees filed a new suit on July 27, 2001, and the original suit was voluntarily dismissed on August 10. The new suit was assigned to the same district judge. The cases of New Hampshire and Rhode Island plaintiffs in the new action were transferred to those districts. From the sixty-four Massachusetts plaintiffs in the new suit, ten plaintiffs were chosen to go forward. One of those settled on the eve of trial and another lost at summary judgment. One plaintiff of the remaining eight, Mac's Shell Service, Inc., operated two stations that were sometimes treated as separate plaintiffs. Therefore, eight plaintiffs representing nine stations proceeded to trial.

The Dealers sued under a variety of theories. First, they contended that the Subsidy had been incorporated into the property leases, although the written leases purported to be integrated contracts under Massachusetts law. They claimed the amended contracts were then breached when Motiva eliminated the Subsidy. Under the Dealers' theory, this breach gave rise to two distinct claims: a state cause of action for breach of contract and a claim under the PMPA that Shell had improperly terminated the franchises when Shell assigned the franchise agreements to Motiva and Motiva terminated the Subsidy. Because no actual termination occurred, the Dealers proceeded under a theory of "constructive termination." Similarly, they claimed Motiva had "constructively nonrenewed" the franchise relationships in violation of the PMPA (even though the franchises were in fact renewed) because the new contracts changed the rent-calculation method and increased the rent, along with other objectionable changes. Finally, the Dealers argued that Motiva failed to set prices for gasoline in good faith,

as required for open price term contracts under Massachusetts law.

The defendants unsuccessfully moved for dismissal on all constructive termination claims and the constructive nonrenewal claims of two plaintiffs on the ground that they were time-barred. They also moved for a judgment as a matter of law on all claims. Following a jury verdict against them on all claims, they properly renewed this motion. They moved as well for a new trial and to set aside the jury's damages awards. The defendants now appeal the denial of all of these motions.

The PMPA

Congress enacted Title I of the PMPA to "remedy the disparity in bargaining power between franchisors and franchisees." S. Rep. No. 95-731, 95th Cong., 2d Sess. 18; *see also Four Corners Serv. Station v. Mobil Oil Corp.*, 51 F.3d 306, 310 (1st Cir. 1995). Because franchisees claimed that this unequal power was often wielded through arbitrary or discriminatory termination or nonrenewal, or *threats* of termination or nonrenewal, the PMPA aimed to remove this potent weapon from the franchisors' arsenal. S. Rep. No. 95-731, at 17 ("Numerous allegations have been made before Congressional committees investigating petroleum marketing problems that terminations and non-renewals, or threats of termination or non-renewal, have been used by franchisors to compel franchisees to comply with marketing policies of the franchisor."); *id.* at 18 ("[T]ermination of franchise agreements during the term as a remedy for contract violations has been repeatedly utilized."). The "PMPA attempts to level the playing field by restricting the grounds upon which a franchisor can assert a unilateral termination or nonrenewal of a franchise." *Id.*[2]

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[2] The PMPA is concerned not only with termination of a franchise agreement, but also with a franchisor's failure to renew such an

The PMPA makes a distinction between a "franchise" and the "franchise relationship." The franchise is a set of definite agreements for 1) lease of the premises, 2) the right to purchase gasoline for resale, and 3) the right to use the franchisor's trademark. 15 U.S.C. § 2801(1). "Franchise relationship" refers to the respective obligations of the franchisor and franchisee created by a franchise. *Id.* § 2801(2). The legislative history of the PMPA makes clear that "franchise" and "franchise relationship" were distinguished to drive home the fact that the franchise relationship survives the expiration of the agreements underlying the franchise. *See* S. Rep. No. 95-731, 95th Cong., 2d Sess. 30 ("The term 'franchise relationship' is utilized to avoid any contention that because the 'franchise' does not exist there is nothing to renew."). The structure and history of the PMPA emphasize Congress's view that the franchisees have a reasonable expectation that the franchises would be renewed and that the relationships would continue.

Accordingly, the PMPA forbids termination of a franchise or nonrenewal of a franchise relationship except under enumerated circumstances and with proper notice. *See* 15 U.S.C § 2802(a) (nonrenewals and terminations generally prohibited); *id.* §§ 2802(b)(2)-(3) (grounds for termination and non-renewal); *id.* § 2804 (notice requirements). The PMPA provides a cause of action to franchisees who suffer termination or nonrenewal in violation of the relevant sections. *Id.* § 2805(a). As long as the action is brought within one year of the termination or

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agreement when it expires. Although the constellation of agreements (real property leases, fuel supply agreements, licenses to use franchisor's trademark) that make up the franchise are definite in term, the "[r]easonable expectations of the parties to a motor fuel franchise are that the relationship will be a continuing one." *Id.* This, of course, encourages franchisees to invest in their franchises and to build up goodwill that benefits both parties.

nonrenewal complained of, *id.* § 2805(a)(1), the franchisee may seek preliminary injunctive relief, *id.* § 2805(b)(2), damages, *id.* § 2805(d), and "such equitable relief as the court determines is necessary," *id.* § 2805(b)(1). The PMPA mandates that preliminary relief "shall" be granted if the plaintiff shows 1) termination or nonrenewal and 2) "sufficiently serious questions going to the merits" that are "a fair ground for litigation," and the court determines 3) that the balance of hardships tips in favor of granting the injunction. *Id.* § 2805(b)(2). In all private civil actions for termination or nonrenewal, it is the franchisee's burden to show termination or lack of renewal. *Id.* § 2805(c).

Standard of Review

We review the denial of judgment as a matter of law de novo as to issues of law. *See Rodriguez-Torres*, 399 F.3d at 57. As to matters of fact, we view the evidence in the light most favorable to the verdict, asking only whether a rational jury could on the basis of that evidence find as the jury has. *See id.* We review a denial of a motion for a new trial for "a manifest abuse of discretion." *United States v. George*, 448 F.3d 96, 101 (1st Cir. 2006). We "will order a new trial only if the verdict is against the demonstrable weight of the credible evidence or results in a blatant miscarriage of justice." *Whitfield v. Meléndez-Rivera*, 431 F.3d 1, 9 (1st Cir. 2005) (internal quotation omitted). We will uphold a jury award if it is a result of "any rational appraisal or estimate of the damages that could be based on the evidence before the jury." *Data Gen. Corp. v. Grumman Sys. Support Corp.*, 36 F.3d 1147, 1172 (1st Cir. 1994) (quoting *Anthony v. G.M.D. Airline Servs.*, 17 F.3d 490, 493 (1st Cir. 1994)). Because it is complex and requires some procedural background, we discuss the applicable standard of review for the statute of limitations claim within the discussion of that issue.

Statute of Limitations

The PMPA contains a one-year statute of limitations.[3] The district court found, and the defendants here do not contest, that the cause of action for constructive termination arose on January 1, 2000, when Motiva terminated the Subsidy. The defendants claim that all of the constructive termination claims are time-barred because this action was not filed until almost nineteen months later, on July 27, 2001.[4] The Dealers point out that in dismissing their motion to be added as plaintiffs to the old action, the district court gave them leave to file a new action "which may be deemed to be related" to the original complaint, and that the first action was not dismissed until after the second was filed.

The defendants filed a motion to dismiss for failure to state a claim on which relief might be granted, citing the lapse of time and the PMPA's statute of limitations. This motion was denied.[5]

Our review of the record indicates that the district court denied the motion to add the individual plaintiffs only because it granted the plaintiffs a right to file a new action that related back. We further conclude that had

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[3] "[N]o such action shall be maintained unless commenced within 1 year after the later of—(1) the date of termination of the franchise or nonrenewal of the franchise relationship; or (2) the date the franchisor fails to comply with the requirements of section 102 or 103." 15 U.S.C. § 2805(a).

[4] In the light of our disposition of the constructive nonrenewal claims as a whole, it is unnecessary to complicate this analysis with the defendants' further claim that two of the lease renewals are also time-barred on the same theory.

[5] The Dealers assert, as they have since their opposition to the motion to dismiss, that this resolution of the motion to amend was the result of a compromise regarding discovery vis-à-vis the new parties. At oral argument, the defendants denied ever agreeing to such a solution.

the district court allowed the motion to amend, the amended pleading would have related back under Federal Rule of Civil Procedure 15. In the light of this, two powerful reasons lead us to uphold the district court's resolution of this issue: first, all the purposes of Rule 15(c) are satisfied, if not its letter; and second, the district court was in a better position when it placed the case in this posture than we are now to assess whether the interests of justice are served by permitting this relation back.[6]

Federal Rule of Civil Procedure 15(c) provides that an amended pleading may be deemed to "relate back" for

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[6] We note that this issue was disposed of below in the district court's denial of a motion to dismiss. The parties skirmish about whether such a denial may even be appealed after a jury trial. Where a denial of a motion for summary judgment is predicated on a genuine dispute over issues of material fact, such a denial is not normally reviewable in this circuit after a "full-dress trial." *Lama v. Borras*, 16 F.3d 473, 476 n.5 (1st Cir. 1994). The Dealers argue, with reason, that this would apply *a fortiori* to a denial of a 12(b)(6) motion. *See Bennett v. Pippin*, 74 F.3d 578, 585 (5th Cir. 1996) ("When the plaintiff has prevailed after a full trial on the merits, a district court's denial of a Rule 12(b)(6) motion becomes moot."). But here the question is one of law—whether relation back can be applied outside of the strict confines of Rule 15(c). We think it likely that this changes the analysis, but because we ultimately hold that relation back was appropriate, it makes no difference: even assuming that the issue was properly preserved, the statute of limitations argument fails. We express no view as to whether in the general case a denial of a 12(b)(6) motion may be appealed after a jury trial; we move on to discuss the relation-back issue only because we think it important to consider whether the district court acted properly in acting outside the letter of the Federal Rules of Civil Procedure. In conducting this analysis, we apply de novo review to the pure legal question. Finding, as we do, that as a matter of law such relation back is within the power of the district court, we then review the decision to grant relation back for abuse of discretion. The finding of facts necessary to that conclusion we review for clear error.

statute of limitations purposes to the date of the pleading if certain conditions are met. The defendants rightly point out that Rule 15 concerns amended pleadings, not new pleadings in separate actions. "Rule 15(c) simply does not apply where, as here, the party bringing suit did not seek to 'amend' or 'supplement' his original pleading, but, rather, opted to file an entirely new [action] at a subsequent date." *Neverson v. Bissonnette*, 261 F.3d 120, 126 (1st Cir. 2001) (noting that a dismissal without prejudice leaves the plaintiff "in the same situation as if [the] first suit had never been filed" for purposes of Rule 15(c)). We note that this case differs from *Neverson* in that here the dismissal of the previous action did not occur until *after* the new pleading was filed, and we note further that the district court expressly suggested a new action be filed at the very moment it denied leave to amend the complaint in the first action.

Acknowledging that the letter of Rule 15 is not met here, we conclude that the rule nonetheless does provide some guidance. Rule 15(c) is "intimately connected with the policy of the statute of limitations." Fed. R. Civ. P. 15(c), advisory committee note. The purpose of statutes of limitations is to avoid the difficulties inherent in litigating matters long past, and to provide repose to potential defendants regarding such matters. *See Nelson v. County of Allegheny*, 60 F.3d 1010, 1014 (3d Cir. 1995) ("Statutes of limitations ensure that defendants are protected against the prejudice of having to defend against stale claims, as well as the notion that, at some point, claims should be laid to rest so that security and stability can be restored to human affairs.") (internal quotation omitted). The defendants at no time could have expected or enjoyed repose regarding these matters. The denial of the motion to add the specific Dealers to the original litigation was accompanied in the same breath by notice that a new complaint might be filed under the same facts. This

occurred in a timely fashion. And the first litigation was not dismissed until after the second one was filed. No evidence of sandbagging was brought forward, nor do we infer any prejudice to the defendants on this record.[7]

Here, the Dealers had sought to vindicate their rights as the Defense Group, but lacked standing in that guise. In denying a motion to add the plaintiffs to the original litigation, the district court indicated it would allow a new filing to relate back to the date of the old one. It seems clear that the district court could instead have allowed the pleadings to be amended to name the plaintiffs individually. While we cannot say with certainty why one course of action was to be preferred over another, we are confident that the district court did not abuse its discretion.

Rule 15(c) does not specifically contemplate the substitution of plaintiffs. *See* Fed. R. Civ. P. 15(c), advisory committee note ("The relation back of amendments changing plaintiffs is not expressly treated in revised Rule 15(c), since the problem is generally easier."). But this is not a bar to relation back here either; assuming that the general principles of Rule 15 are to govern this admittedly unusual situation, we find that substituting plaintiffs here wreaks no injustice.

> [W]e have laid down three separate requirements applicable to plaintiffs who seek succor under Rule 15(c)(3): The amended complaint must arise out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading; there must be a sufficient identity of interest between the new plaintiff, the old plaintiff, and their respective claims so that the defendants can be said

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[7] We note also that the record is replete with delays by the defendants, and to that extent their equitable claim to the benefits of a speedy process is attenuated.

> to have been given fair notice of the latecomer's claim against them; and undue prejudice must be absent.

Young v. Lepone, 305 F.3d 1, 14 (1st Cir. 2002) (quoting *Allied Int'l v. International Longshoremen's Ass'n*, 814 F.2d 32, 35-36 (1st Cir. 1987)). Accepting, as the district court did, that the Dealers were members of the Defense Group,[8] these factors are met here. The district court's factual conclusion does not represent an abuse of discretion, and so we adopt it.

The original complaint states the same causes of action, arising from the same events, as the new complaint. The Dealers have always claimed that they were all members of the Defense Group. That organization was established only to assert its members' rights and protect their interests, and so we find sufficient identity of interest to put the defendants on notice of the claims against them. And there is no undue prejudice where the Dealers are simply asserting themselves a claim they had made through a proxy well within the statute of limitations. Had the motion to amend been granted, and the individual plaintiffs named, relation back would have been within the district court's discretion. The district court, then, properly allowed the relation back of the new case to the previous one, and therefore did not err when it denied the motion to dismiss.[9]

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[8] The Dealers presented testimony on this issue at trial. While that testimony was of course not available to the district court when it decided the motion to amend in *Tsaniklides* and the motion to dismiss in this case, it does help to corroborate the district court's determination.

[9] The Dealers provide two alternate theories on which to uphold the denial of the motion to dismiss: equitable estoppel and equitable tolling of the statute of limitations. Because the district court denied the motion to dismiss on the basis of relation back, we have found it most convenient to follow that analysis here. We note only that all of

State Contract Claim

The defendants appeal the jury's determination that the leases were orally amended to include the Subsidy, and therefore when the Subsidy was ended, the leases were breached. First, the defendants contend that the leases were completely integrated, meaning oral representations before or during the execution of the contract must be excluded by the parol evidence rule. Second, they claim that even if the leases were not integrated, the jury had insufficient evidence to conclude that the leases were amended to include a promise to continue the Subsidy.

The defendants argue as an initial matter that the leases were completely integrated agreements. The leases indisputably represented that they were integrated agreements and that any subsequent modification had to be in writing. The defendants claim the integration clause operated to insulate the leases from oral representations made prior to or contemporaneous with execution. But a document is not integrated merely because it says so. *See* Restatement (Second) of Contracts § 209 cmt. b (1981) ("Written contracts, signed by both parties, may include an explicit declaration that there are no other agreements between the parties, but such a declaration may not be conclusive.").

In Massachusetts, "the question of integration is one of fact reserved for the trial judge, whose resolution of that issue will not be reversed unless clearly erroneous." *Cambridgeport Sav. Bank v. Boersner*, 413 Mass. 432, 436 n.7, 597 N.E.2d 1017 (1992); *Antonellis v. Northgate Constr. Corp.*, 362 Mass. 847, 850-51, 291 N.E.2d 626 (1973) (even absent specific evaluation of evidence by trial judge, finding of non-integration upheld as not clearly

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these approaches address the fundamental issue of whether defendants suffer undue prejudice as a result of delay or lack of notice.

erroneous); *Alexander v. Snell*, 12 Mass. App. Ct. 323, 424 N.E.2d 262, 264 (1981); *accord Brennan v. Carvel Corp.*, 929 F.2d 801, 807 (1st Cir. 1991) ("[U]nder Massachusetts law, the determination of whether a contract is completely or partially integrated, or whether a second contract is collateral to an integrated agreement, is a question of fact to be decided in the first instance by the trial judge.").[10]

Here, the district court did not make a specific finding about integration, but the charge to the jury on amendments compels the inference that the agreements were not integrated. The jury was instructed to consider what the parties said and did concerning the lease; because the instruction did not exclude actions prior to or contemporaneous with the execution of the written lease, the district court must have concluded that the lease was not an integrated agreement.

After review of the record, we cannot say that this determination was clear error. The Subsidy was explained to each plaintiff in documents accompanying the lease, and many plaintiffs testified they regarded the Subsidy as essential to their businesses. There was evidence that the defendants said that the Subsidy was intended to be permanent, that the 30-day-notice provision was only in place for cases of war or embargo, and that the Dealers could rely on the continuation of the Subsidy or something like it. The district court therefore had ample evi-

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[10] We are not governed by state practice as to the division of labor between judge and jury, even in diversity cases, *see Byrd v. Blue Ridge Rural Elec. Coop.*, 356 U.S. 525, 538 (1958), but in all events federal practice likewise lets judges determine whether an agreement is integrated, *Merk v. Jewel Food Stores Div. of Jewel Cos.*, 945 F.2d 889, 893 (7th Cir. 1991) (applying federal common law of contracts and holding that "[w]hether a writing is fully integrated is generally a question of law to be resolved by a court").

dence before it to determine that the lease was not an integrated agreement.

Because the leases were not integrated, they could be varied by mutual agreement. "Mutual agreement on modification of the requirement of a writing may . . . be inferred from the conduct of the parties and from the attendant circumstances." *First Pa. Mortg. Trust v. Dorchester Sav. Bank*, 395 Mass. 614, 625, 481 N.E.2d 1132 (1985) (internal quotation omitted). The defendants assert that the evidence was insufficient to allow the jury to decide, as it did, that a promise to continue the Subsidy was incorporated into the leases. The district court instructed the jury: "[Y]ou may consider what each one said, one to the other, how they behave[d], what each did, what each knew and what the circumstances were . . . then you may infer . . . from their statements and their conduct . . . whether both Shell and each plaintiff agreed to amend the leases." Evidence adduced at trial included not only representations made directly to the Dealers that the Subsidy or something like it would always be available, but also internal Shell documentation indicating that the Subsidy was intended to be permanent, that franchisees should plan their businesses around the continued availability of the Subsidy, and that franchisees would understand the loss of the Subsidy to be a breach of a promise by Shell. A rational jury viewing this evidence might come to the conclusion that the leases were amended to include the Subsidy.

Constructive Termination

The Dealers claimed that when Motiva breached their leases by eliminating the Subsidy, that breach perfected a constructive termination by Shell. The PMPA allows assignment of duties in franchise agreements in accordance with state law. *See* 15 U.S.C. § 2806(b). But an assignment that is violative of state law, or one that results in a breach of one of the statutory components of a

franchise, gives rise to a claim under the PMPA against the original franchisor/assignor. In the words of the Fourth Circuit, "A franchisor cannot circumvent the protections the [PMPA] affords a franchisee by the simple expedient of assigning the franchisor's obligation to an assignee who increases the franchisee's burden . . . ." *Barnes v. Gulf Oil Corp.*, 795 F.2d 358, 362 (4th Cir. 1986) (reversing summary judgment and holding that where assignee breaches franchise agreement, action will lie against franchisor/assignor). In *Chestnut Hill Gulf v. Cumberland Farms, Inc.*, 940 F.2d 744 (1st Cir. 1991), we adopted the test for constructive termination articulated by the Sixth Circuit.

> To sustain a claim, under the PMPA, that a franchisor assigned and thereby constructively terminated a franchise agreement, the franchisee must prove either: (1) that by making the assignment, the franchisor breached one of the three statutory components of the franchise agreement, (the contract to use the refiner's trademark, the contract for the supply of motor fuel, or the lease of the premises), and thus, violated the PMPA; or (2) that the franchisor made the assignment in violation of state law and thus, the PMPA was invoked.

Id. at 750-51 (quoting *May-Som Gulf, Inc. v. Chevron U.S.A., Inc.*, 869 F.2d 917, 922 (6th Cir. 1989)).

What set *Barnes* apart from both *Chestnut Hill Gulf* and *May-Som Gulf* was that in *Barnes* the assignment of the contract had resulted in gasoline prices above the price specified in the contract; in other words, *Barnes* concerned a breach of one of the statutory elements of the franchise, the agreement for the supply of branded motor fuel. The Fourth Circuit vacated summary judgment for the defendant, holding that the breach of the contract for the supply of gasoline created a constructive termination of the franchise. In *Chestnut Hill Gulf* we

held the PMPA was not implicated because there was no evidence that any of the statutory components of a franchise had been breached. "[A]ll thirteen dealers continued to occupy the same service stations under the same leases; they continued to purchase Gulf brand gasoline under the same supply agreements; and they continued to do business under the same Gulf trademark." *Chestnut Hill Gulf*, 940 F.2d at 752. In *May-Som Gulf*, the defendants were entitled to summary judgment because the plaintiffs had merely complained of *potential* breaches to the franchise agreement. In the case before us, the Dealers have proven to the jury's satisfaction that Motiva breached the lease component of the franchise agreements. That breach allowed the jury to find that Shell constructively terminated the Dealers' franchises when it assigned the franchises to Motiva.

The defendants argue that in order to show a constructive termination, the breach must be contemporaneous with the assignment and the breach must amount to a total deprivation of one of the three elements of the franchise. Both contentions misunderstand constructive termination.

First, we agree with the Fourth Circuit that an action for constructive termination lies against the assignor of a franchise when the assignee breaches the franchise. *Barnes*, 795 F.2d at 362. This prevents the assignor/franchisor from shielding itself against liability through the use of another corporation. "The [PMPA] does not contemplate that a franchisee should be relegated to seeking damages from an assignee that might not have the resources to satisfy a judgment." *Id.* A delay between the assignment and the breach changes nothing. The reasons for this are even stronger where the assignee is a subsidiary of the franchisor, or a joint venture in which the franchisor is a party.

Second, the breach of the statutory element of the franchise does not have to be a total breach. In *Barnes* the plaintiff was "forced to raise her prices, and her sales and net income . . . declined." *Id.* at 361. She did not suffer a complete loss of the benefits of the motor fuel supply contract. The defendants' attempted analogy to constructive termination in employment law or constructive eviction in landlord-tenant law is misleading. Those doctrines require an actual severance of the relationship: The employee must leave the workplace; the tenant must move out. But here, as the Dealers testified, sunk costs, optimism, and the habit of years might lead franchisees to try to make the new arrangements work, even when the terms have changed so materially as to make success impossible. Indeed, some plaintiffs testified they had gone into personal debt, driven themselves into bankruptcy, or enlisted the aid of family members working without pay to make ends meet. To require an actual abandonment of years of work and investment before we recognize a right of action under the PMPA would be unreasonable. The "congressional plan would be frustrated by requiring a franchisee to go out of business before invoking the protections of the PMPA." *Pro Sales, Inc. v. Texaco, U.S.A.*, 792 F.2d 1394, 1399 (9th Cir. 1986).

We do not here say that any material breach of the lease would necessarily be sufficient to sustain the constructive termination claim. In this case, the district court instructed the jury that it could find constructive termination only if the breach of the lease "was such a material change that it effectively ended the lease, even though the plaintiffs continued to operate the business . . . . It's not simply was the lease breached, but did that breach amount to . . . effectively the end of the franchise relationship." In this instruction the district court set an appropriate threshold.

We agree with the district court that an assignor may be liable for even a subsequent breach of the franchise agreement by an assignee, and that a breach of the franchise agreement need not result in complete deprivation of a statutory element of the franchise to support a constructive termination.

Indeed, this case presents a strong argument for the doctrine of constructive termination. At trial the Dealers argued that Shell assigned the franchise agreements to Motiva, even *created* Motiva, in order to squeeze them out of their franchises. They presented evidence that this was the reason for the change in the rent formulation, the elimination of the Subsidy, and the dramatic increase in rents they paid. If the jury accepted this as the reason, the case falls within the scope of the PMPA, which is designed not to freeze the franchise agreements exactly where they were,[11] but to prevent franchisors from improperly terminating franchises and thereby to ensure that franchisees benefit from successful investment in their franchises.

This same protection for franchisee expectations underlies the PMPA's requirement that a franchisor make a bona fide offer, or grant a right of first refusal, to the franchisee when the franchisor contemplates withdrawing from the relevant market, selling the underlying real property, or dedicating the property to another use. 15 U.S.C. § 2802(b)(2)(E) & (b)(3)(D). This is also why parts of the PMPA place more restrictions on franchisors when the purpose of termination or nonrenewal is to convert

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[11] *See May-Som Gulf*, 869 F.2d at 921-22 (noting that the PMPA does not mandate "a permanent status quo" and that the act was not meant to stymie "major national acquisition and large scale divestiture") (quoting *Russo v. Texaco, Inc.*, 630 F. Supp. 682, 683 (E.D.N.Y. 1986)).

the station to direct operation by the franchisor.[12] Were it otherwise, the franchisor could extract any increase in value created by the franchisee's investment, without sharing that increase with the franchisee. This would dampen the incentive for a franchisee to develop the business. In this case, the Dealers presented evidence that the defendants wanted to convert their stations to direct operation.[13] Where a franchisor has breached its obligations to the franchisee such that the franchisee faces the

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[12] For example, subsection 2802(b)(2)(E) requires that a termination made pursuant to a franchisor's withdrawal from "the marketing of motor fuel through retail outlets in the relevant geographic market area" be "not for the purpose of converting the premises . . . to operation by employees or agents of the franchisor for such franchisor's own account." For another example, nonrenewals are normally allowed if they are based on determinations "to materially alter, add to, or replace such premises," or determinations that the franchise "is likely to be uneconomical despite any reasonable changes . . . which may be acceptable to the franchisee." But subsection 2802(b)(3)(D)(ii) explicitly prohibits nonrenewal under those same circumstances when that determination is "made for the purpose of converting the leased marketing premises to operation by employees or agents of the franchisor." This language forbids termination or nonrenewal under these circumstances even if the right of first refusal is given or the bona fide offer is made. (This restriction does not apply to sales of the premises, perhaps because the drafters of the legislation did not imagine that the sale of the underlying premises could be for the purpose of converting the station to the franchisor's control. *But cf. Patel v. Sun Co.*, 141 F.3d 447 (3d Cir. 1998) (when franchisor sells underlying property with leaseback provision to operate service station, PMPA implicated in neither the sale of the property nor the termination of the franchise on expiration of the franchisor's lease).

[13] Nothing in the PMPA would prevent the defendants from buying the Dealers out. What the PMPA does forbid is franchisors using their power to dictate impossible franchise terms in order to force the franchisees to walk away from their investments or to sell them at artificially low prices. That is exactly what the Dealers claimed was happening here.

effective end of the franchise, the PMPA must treat that as a termination of the franchise.

Neither will we contradict the jury's verdict. When we are satisfied that the law has been faithfully interpreted, we will overturn a jury's verdict only when no reasonable jury could have come to that verdict on the facts presented. *See Rodriguez-Torres*, 399 F.3d at 57. The jury heard ample evidence to conclude that the financial hardship resulting from the loss of the Subsidy meant the end of the relationship. The defendants had opportunity to attack the credibility of that evidence and to put on their own. We will not step into the jury box to provide a second opinion. Nor was the verdict against the demonstrable weight of the evidence or likely to result in a blatant miscarriage of justice. Consequently, there was no manifest abuse of discretion in the district court's denial of the motion for a new trial.

Constructive Nonrenewal

As each Dealer's lease expired, Motiva presented a new lease. The new leases changed the way rent was calculated, which had the effect of increasing the rents charged. The Dealers argued that this change and others were not made in good faith, as required by the PMPA, but rather were part of the plan to drive the franchisees out of business. They claimed that inclusion of these terms amounted to a nonrenewal of their agreements, even though each Dealer signed a new agreement (albeit "under protest"). We conclude that the PMPA does not support a claim for nonrenewal under these circumstances. We therefore vacate this portion of the district court's judgment and remand with instructions to issue judgment on this claim for the defendants.

It is the plaintiffs' burden to prove that a nonrenewal or a termination has taken place. 15 U.S.C. § 2805(c). A notice of nonrenewal issued pursuant to 15 U.S.C. § 2804,

while not strictly speaking a nonrenewal, presumably satisfies this burden. *See Dersch Energies, Inc. v. Shell Oil Co.*, 314 F.3d 846, 864 (7th Cir. 2002) ("[A] franchisor's issuance of a notice of nonrenewal is the precise equivalent of a nonrenewal."); *Lippo v. Mobil Oil Corp.*, 776 F.2d 706, 720 (7th Cir. 1985) ("In an action brought under section 2805(a) the franchisee has the burden of proving termination of the franchise. (This must really mean attempted termination if the injunctive relief is to be of any use.)"). *But see Seckler v. Star Enter.*, 124 F.3d 1399, 1403 (11th Cir. 1997) (no claim under PMPA when notice of nonrenewal rescinded before action commenced); *Akky v. BP Am.*, 73 F.3d 974, 974 (9th Cir. 1996) (same).

The threshold question is whether to recognize such a "constructive nonrenewal" and thereby bring Motiva's actions within the reach of the PMPA. The Ninth Circuit is the only circuit so far to recognize a claim for constructive nonrenewal. *Pro Sales*, 792 F.2d 1394. In *Pro Sales*, the plaintiff signed a renewal agreement "under protest" and immediately brought suit under the PMPA. *Id.* at 1398. The court relied on legislative history to conclude that these facts gave rise to a claim for constructive nonrenewal under PMPA. *Id.* at 1399.

Pro Sales has been rejected by the other circuits to consider the issue. The PMPA, after all, requires a franchisor to provide a notice of nonrenewal, 15 U.S.C. § 2805(c), and then provides a framework for the franchisee to seek preliminary relief on receipt of that notice, *id.* § 2805(b)(2). Two circuits have held that this notice-and-preliminary-relief structure is evidence that Congress intended to limit the reach of the PMPA to cases where either a notice is given or an actual nonrenewal has taken place. *See Abrams Shell v. Shell Oil Co.*, 343 F.3d 482, 489 n. 16 (5th Cir. 2003) ("[T]he Seventh Circuit rejected the *Pro Sales* approach based on a 'franchisee's

ability to obtain an injunction under the PMPA' in cases of nonrenewal. We reject the *Pro Sales* approach on the same basis." (quoting *Dersch Energies*, 314 F.3d at 865)). Thus, in *Dersch Energies*, the Seventh Circuit held that a franchisee who had signed a renewal "under protest" did not have a claim for constructive nonrenewal because the franchise had in fact been renewed. "Had Dersch allowed the defendants to issue a formal notice of nonrenewal, its dispute with the defendants would have been transformed from a mere contract dispute into a nonrenewal (within 90 days) of its franchise relationship—thus allowing it to . . . maintain suit" under the PMPA. *Id.* at 866; *accord Abrams Shell v. Shell Oil*, 343 F.3d 482, 489 (5th Cir. 2003) ("We find the Seventh Circuit's reasoning in *Dersch Energies* to be especially persuasive, thus we apply the same logic to this case. Plaintiffs have not provided any evidence that Defendants failed to renew the relevant agreements; therefore, Plaintiffs have not shown a breach in the franchise relationship.").

The plaintiffs' constructive nonrenewal argument requires the following reasoning. Had the Dealers refused to agree to the new contract terms, Motiva would have issued notices of nonrenewal alleging as a permissible basis for nonrenewal the "failure of [the parties] to agree on changes or additions to the provisions of the franchise . . . ." 15 U.S.C. § 2802(b)(3)(A). The Dealers would have asserted that the nonrenewal was improper because the changes were not offered in good faith, *id.* § 2802(b)(3)(A)(i), or else were offered in order to convert the premises to the franchisor's own control, *id.* § 2802(b)(3)(A)(ii). On those grounds the Dealers could have sought preliminary relief and damages under the PMPA. *Id.* § 2805(a) & (b).

The stumbling block that trips up the plaintiffs is that, rather than insist on receiving notices of nonrenewal, the Dealers signed the new agreements "under protest" and

continued in operation under the new agreements. We conclude that just as the PMPA requires a clear indication from franchisors that they seek nonrenewal of a franchise relationship, it likewise requires that franchisees faced with objectionable contract terms refrain from ratifying those terms by executing the contracts (even "under protest") and operating under them. Allowing a franchisee to sign "under protest" and then later challenge the renewal would extend the period of uncertainty through the entire first year of a contract that in this case was only three years. Recognizing constructive nonrenewal also would enable a franchisee to sign the contract and simultaneously challenge it. If its claims were rejected by the courts, the franchisee would have lost nothing and could continue to operate the franchise under the agreement with the PMPA-enforced reasonable expectation of continuation and renewal. Absent a claim for constructive nonrenewal, a franchisee must wait for a notice of termination to bring suit under the PMPA. The franchisee therefore risks the end of the franchise if the claim fails and so must carefully weigh the decision to sign or sue.[14] This is the balance Congress has struck,

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[14] In *Pro Sales* the suit was filed immediately and the plaintiff obtained preliminary relief so that it never operated under the new contract. This is different from *Dersch Energies*, where the plaintiff operated under the new contract "for just under a year" before filing suit. 314 F.3d at 865. The *Dersch* court noted the distinction, but found it irrelevant. *Id.* We do not address the question whether a preliminary injunction enabling the franchisee to avoid operating under the new agreement combined with an immediate suit, as in *Pro Sales*, would satisfy the requirements for bringing suit under the PMPA. Such a case would avoid several of the problems we have identified, but would still allow a franchisee to challenge an agreement as a nonrenewal while retaining the right to take advantage of that agreement should the challenge fail. We hold only that under the facts before us today we cannot recognize a claim for constructive nonrenewal.

and should we prefer another, we would not be free to impose it. Consequently, we reject application of constructive nonrenewal to these facts.

We note with some concern the limited scope of the PMPA. Two unexpected consequences of the legislation seem to loom as potential problems. The first is that franchisors will conform their behavior to the letter of the law but still use their position of power to impose their will on franchisees. The statute is of course not a panacea and cannot be faulted for what it fails to do. But some statutory protection is worse than none when it serves as protective cover for the very misdeeds it purports to eliminate. The second unintended consequence is that, to the extent Congress succeeds in leveling the playing field, it makes the franchise arrangement less appealing to franchisors. It is not difficult to imagine protections for franchisees so strong that franchisors abandon the model entirely. Evidence introduced at trial spoke to both of these hazards. However, these are issues for Congress to weigh and remedy, not for the courts.

Because we do not recognize a claim for nonrenewal under the PMPA where the franchisee has signed and operates under the renewal agreement complained of, we vacate this portion of the district court's judgment and remand with instruction to enter judgment on this count for the defendants.

Unreasonable Gasoline Prices

The Uniform Commercial Code, as adopted in Massachusetts, contemplates the enforcement of contracts in which one party sets the price of goods over time. Mass. Gen. Laws ch. 106, § 2-305(2). But the price must be set in good faith. *Id.* The jury found that the defendants had failed to set reasonable prices in good faith. The defendants appeal on two grounds. First, they claim that the

"good faith" requirement means only that such a price may not discriminate among similarly situated buyers.[15] And second, the defendants assert that the Dealers' evidence of unreasonable pricing is inadequate as a matter of law, because 1) it was based only on retail pricing charged by competitors to the Dealers, rather than DTW prices charged to those competitors; and 2) the Dealers' expert presented pricing analysis of only one competitor, thereby failing to establish a "range" of prices outside of which the defendants' wholesale prices fell. We find neither contention persuasive.

Section 2-305(2) "rejects the uncommercial idea that . . . the seller . . . may fix any price he may wish by the express qualification that the price so fixed must be in good faith. Good faith includes observance of reasonable commercial standards of fair dealing . . . ." *Id.* § 2-305(2) cmt. 3; U.C.C. § 2-305(2) cmt. 3. "[I]n the normal case a 'posted price' or a future seller's or buyer's 'given price,' 'price in effect,' 'market price,' or the like satisfies the good faith requirement." *Id.* The defendants and amici urge us to read this comment as providing an absolute safe harbor for nondiscriminatory posted prices in open price term contracts. This we will not do.

For one thing, the very comment on which the defendants and amici rely expressly invokes the general notion of "reasonable commercial standards of fair dealing." If the comment meant that only discriminatory pricing would be disallowed it certainly could have said that. For another, it is clear to us that a situation in which one merchant is raising its prices in order to force a customer out of business is hardly the "normal case." The Eleventh Circuit allowed this question to go to a jury in a class action involving another oil company's pricing policies.

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[15] In this assertion they are supported by amici, whose brief is gratefully acknowledged.

Allapattah Servs. v. Exxon Corp., 333 F.3d 1248, 1262 n.16 (11th Cir. 2003) (conceding that in a "normal case" nondiscriminatory pricing is protected, but holding that where the allegation was that an oil company was trying to drive service stations out of business, "whether this case constituted a normal case was a factual issue necessary to determine whether Exxon acted in good faith" and therefore rightly submitted to the jury). More recently, the Fifth Circuit upheld the denial of a motion for judgment as a matter of law on the basis that setting gasoline prices in bad faith to drive franchisees out of business violated the UCC. *Mathis v. Exxon Corp.*, 302 F.3d 448, 457-59 (5th Cir. 2002) ("[T]he jury's finding that Exxon breached its duty of good faith in setting the DTW price it charged the plaintiffs is not without foundation in the law or the evidence."); *see also Bob's Shell, Inc. v. O'Connell Oil Assocs.*, 2005 U.S. Dist. LEXIS 21318 (D. Mass. Aug. 31, 2005); *Wayman v. Amoco Oil Co.*, 923 F. Supp. 1322, 1349 (D. Kan. 1996) (finding that the case before it was a "normal case" but noting that "[i]f there was evidence that Amoco had, for example, engaged in discriminatory pricing or tried to run plaintiffs out of business, then the court's decision might be different"). *But see Shell Oil v. HRN, Inc.*, 144 S.W.3d 429, 435-38 (Tex. 2004) (holding absence of price discrimination created presumption of good faith notwithstanding allegations that that oil company set prices in bad faith as part of a plan to drive franchisees out of business).

Commerce is predicated on the idea that a transaction is good for both buyer and seller. The comment recognizes that allowing one party complete control over the price would be "uncommercial." We do not think the only reason for this is the risk of price discrimination. The drafters of the UCC and amici here are rightly concerned about a flood of litigation second-guessing every price set in an open price term contract. Mere allegations of bad

faith will never be enough to survive summary judgment. But this case comes to us after a jury verdict finding bad faith and commercial unreasonableness.

Nor do the defendants' objections to the sufficiency of the evidence require us to set the jury verdict aside. While perhaps more specific and more comprehensive evidence would be preferable, the jury had enough evidence of the defendants' motives and practices, as well as enough information about competitors' pricing, to come to the conclusion that the DTW prices were commercially unreasonable. Specifically, the use of competing gas stations' retail prices to draw conclusions about what those stations might be paying for gasoline is not ideal, but is adequate to the task at hand. In fact, it is the same benchmark that the defendants used in their "street-back" pricing model in setting the DTW price in the first place. In the light of this, the defendants cannot be heard to complain that such prices are not a good measure of what other distributors of gasoline are charging. And although the Dealers' expert failed to present a "range" of such prices, the expert testimony was not the only testimony available. One Dealer testified that the *retail* prices he observed were equal to or lower than the *wholesale* prices he paid. Additionally, at least one Dealer had firsthand knowledge of the DTW prices charged in the same area by another franchisor. On appeal, the defendants put forward once again the contentions of their own experts regarding the range of prices set by competitors. But it was up to the jury to choose between these competing characterizations, and the jury did so.

Damages[16]

The defendants argue that the damages awarded for the PMPA constructive termination claim are not supported by sufficient evidence. The district court instructed the jury to calculate two kinds of damages: damages in the amounts of rents paid that were in excess of the rents under the Subsidy, and damages for reduction in the values of the Dealers' businesses. We agree with the district court that there was ample evidence in the record for the jury to make a damages award, and we uphold that award as reasonable.

The defendants claim that the damages are not supported by sufficient evidence for two reasons. First, the plaintiffs' expert used the VRP when calculating damages for excess rent, rather than the STIP, as would have been correct. Because the STIP was less generous, the expert's figures were probably too high. And second, the expert presented damages figures for lost business value, but those figures were based on excess rent paid under the new leases, not on the elimination of the Subsidy. Because this testimony applied properly only to damages under the constructive *nonrenewal* claim, the defendants say that a correspondence between the expert's figures and the actual awards for lost business value awarded under the constructive *termination* theory must be error. We address each of these in turn.

The judge instructed the jury to find damages for excess rent paid due to the elimination of the Subsidy and

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[16] Damages for the state contract claim duplicate those for constructive termination under the PMPA. We discuss these damages only once, under the PMPA. Also, because we vacate the jury's verdict on the constructive nonrenewal claim, we do not consider the damages awarded under that claim. For the same reason, we do not address the defendants' argument on appeal that the awards for constructive termination and constructive nonrenewal were duplicative.

for the loss of value to the Dealers' businesses due to the increased rent and the higher gasoline prices.

Calculation of excess rent requires several predictions: of the Subsidy threshold amount, of the discount rate, and of how much gasoline the Dealers could have sold under the scheme. Aside from those assumptions it is a relatively certain calculation, on which expert testimony was received.[17] The Dealers' damages expert concededly used the VRP instead of the STIP to calculate damages, thereby potentially inflating the damages. But even if we could state with certainty that the damages were therefore inaccurate, that would not necessitate our remanding for a new damages calculation or our settling the matter ourselves. A clock that is five minutes fast is, strictly speaking, wrong. But it still may give a general sense of the time and thereby serve its purpose. And the damage figures provided by the expert are, after all, only guideposts for the jury.

Calculating the loss of business value, on the other hand, relies on many more intangible factors and requires many more assumptions. In this respect it is similar to calculating future lost profits, which we have previously held is a more speculative inquiry than normal economic damages calculations. *See, e.g., Camar Corp. v. Preston Trucking Co.*, 221 F.3d 271, 279 (1st Cir. 2000) ("[M]athematical precision is not required in calculating lost profits" but "a damages award must have a rational

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[17] Even this normally simple calculation is complicated somewhat in these circumstances. Higher rents may have forced the Dealers to maintain higher gasoline prices, which in turn might have lowered sales volume. The Subsidy reduced rents based on gasoline volume, so a change in that volume would render more uncertain even the damages on this element. (At least one of the Dealers testified that he would sometimes lower his gasoline prices because he could recoup the lost margin based on increased volume and the lowered rent provided by the Subsidy based on that volume.)

basis in the evidence." (internal quotation omitted)); *E. Mountain Platform Tennis v. Sherwin-Williams Co.*, 40 F.3d 492 (1st Cir. 1994) (upholding as not erroneous a jury's award of future lost profits where the company was only "at a break-even point" and operations were not yet profitable). We reject the defendants' comparison of this case to *Kolb v. Goldring*, 694 F.2d 869, 873 (1st Cir. 1982). That case dealt with lost wages, in a statutory setting that limited recovery to "accounts owing" on a similar footing as a "common law suit for back wages for breach of contract." *Id.* at 871-82. Here, the plaintiffs are entitled to the loss of the value of their business as a result of the defendants' actions.

Because that calculation is necessarily complex and uncertain, we require from the jury less rigor in making the award. Here, along with expert testimony, the Dealers presented testimony that the defendants themselves had valued these stations more highly before the elimination of the Subsidy, and that some of the franchises had lost substantial value. We recognize the wide latitude afforded the jury in this situation—asked to make an uncertain calculation on little hard evidence—and we are mindful that we review to see only if no rational jury could have made this award. "[T]he assessment of damages cannot be disturbed unless the award exceeded any rational appraisal or estimate of the damages that could be based upon the evidence or was grossly excessive, inordinate, shocking to the [conscience] of the court, or so high that it would be a denial of justice to permit it to stand." *Consolo v. George*, 58 F.3d 791, 795 (1st Cir. 1995) (quotation marks and citations omitted). We decline to go so far.

The jury's awards largely correlate with the figures put forward by the Dealers' damages expert. We believe, as did the district court, that once the weaknesses in the expert's figures were pointed out in closing arguments

and jury instructions, the jury nonetheless was free to use them as markers of probable damages. That the jury adhered closely to these numbers does not change the fact that the jury was aware of their inadequacies. The jury may have decided that they were close enough, or that no other method of calculation would be better. While a jury is not free "to pull figures out of a hat," *Kolb*, 694 F.2d at 873, we believe that the expert's testimony, the availability of the expert's background data, and the cautionary instruction issued by the district court gave enough guidance to the jury.

And the jury did not simply parrot the expert's figures in any event. In fact, where the jury *did* depart from the experts' figures, the defendants attack those departures as aberrations deserving of reversal. Three Dealers received awards in excess of the damage expert's calculations. The defendants characterize these as mystery "bonus" amounts unsupported by any view of the evidence. But each of these three Dealers testified to particular hardships that the jury might have thought indicated special reductions in business value. The jury may well have been performing its function in calculating losses in business value stemming from those hardships.

Similarly, we find that the jury had ample evidence to make a damages award for the claim under the open price term of the gasoline supply contract. That it differed in some particulars from the numbers put forward by the expert is immaterial, particularly where, as here, different forms of evidence showed different pieces of this picture.

The award of attorneys' fees is mandated by the PMPA. Because we uphold only one of the two statutory claims, however, we must remand for a determination whether the failed constructive nonrenewal claim was a "severable" claim for the purpose of awarding attorney's fees. Such fees are normally not recoverable. *See Figue-*

roa-Torres v. Toledo-Dávila, 232 F.3d 270, 278 (1st Cir. 2000) (fees for unsuccessful severable claims normally not recoverable); *Coutin v. Young & Rubicam*, P.R., 124 F.3d 331, 339 (1st Cir. 1997) (discussing framework for determining whether to reduce fees); *see also Hensley v. Eckerhart*, 461 U.S. 424, 434-37, 103 S. Ct. 1933, 76 L. Ed. 2d 40 (1983). We are mindful both of the district court's discretion in this matter, and of the Supreme Court's admonition that determination of attorney's fees should not result in a second major litigation. *Hensley*, 461 U.S. at 437, 103 S. Ct. 1933. But we have no basis here on which to make a judgment, and so we must remand.

Conclusion

The judgment of the district court on the state contract claims, the unreasonable gasoline pricing claims, and the constructive termination claims is **affirmed**. The judgment on the constructive nonrenewal claims is **reversed**. The jury awards as to the surviving claims are **affirmed** as rational awards supported by sufficient evidence. The award of attorney's fees and costs is **vacated** and **remanded** for reconsideration in the light of our mixed disposition of the claims under the PMPA. Costs on appeal are awarded to the appellees.

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 01-11300-RWZ

MAC'S SHELL SERVICE, INC., JOHN A. SULLIVAN, RAM CORPORATION, INC., STEPHEN PISARCZYK, CYNTHIA KAROL, J&M AVRAMIDIS, INC., SID PRASHAD, THREE K'S, INC. AND AKMAL, INC.,

Plaintiffs,

v.

SHELL OIL COMPANY, INC., SHELL OIL PRODUCTS COMPANY, LLC (F/K/A SHELL OIL PRODUCTS COMPANY), AND MOTIVA ENTERPRISES, LLC

Defendants.

JUDGMENT

October 27, 2006

Based upon (i) the Jury's Special Verdict dated December 8, 2004, (ii) the September 19, 2005 Order on Trial and Post-Trial Motions, (iii) the Joint Motion for Entry of Separate Judgment Pursuant to Fed. R. Civ. P. 54(b) dated January 24, 2006, and (iv) the August 31, 2006 Memorandum of Decision, **IT IS HEREBY ORDERED, ADJUDGED, AND DECREED as follows:**

1. With respect to the claims asserted by Plaintiffs, John A. Sullivan, RAM Corporation, Inc., Stephen Pisarczyk, Cynthia Karol, Mac's Shell Service, Inc., J&M

Avramidis, Inc., Sid Prashad, Three K's, Inc. and Akmal, Inc., and for the reasons set forth in the parties' Joint Motion for Entry of Separate Judgment Pursuant to Fed. R. Civ. P. 54(b), it is this Court's determination that there is "no just reason for delay" in entering judgment. Accordingly, judgment shall enter as set forth below.

2. Judgment in favor of Plaintiff **John A. Sullivan** against Defendants, Shell Oil Company, Shell Oil Products Company, and Motiva Enterprises LLC, jointly and severally, on Counts II, V, and VI as follows:

(i) As to Count II (Violation of the PMPA based on Constructive Termination of the franchise relationship), Judgment as follows: (1) damages for loss of the STIP subsidy in the amount of $23,271.00; (2) based on the evidence presented by plaintiffs' expert, these lost subsidy amounts averaged $4,654.20 a month, began on January 1, 2000 and ended on June 1, 2000 when plaintiff entered into a Motiva lease; prejudgment interest is awarded on these amounts at the annual rate of 3.08% and shall run from the date each payment would have been made to the date of entry of judgment; and (3) additional damages in the amount of $100,000.00, with prejudgment interest at an annual rate of 2.75% from December 31, 2003 to the date of entry of judgment.[1]

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[1] The interest rates applied to damages for loss of the STIP subsidy (3.08%), excess rent (2.85%), lost business value (2.75%), and the additional unspecified damage awards (2.75%) are those identified in Defendants' Memorandum of Law Regarding Rate of Prejudgment Interest on PMPA Claims dated January 24, 2006. Defendants calculated what the damages and prejudgment interest amounts were as of January 1, 2006 for the Constructive Termination, Constructive Non-Renewal and Breach of Lease claims, respectively, and set those calculations forth in Exhibit B to the Joint Motion For Entry

(ii) As to Count II (Violation of the PMPA based on Constructive Non-Renewal of the franchise relationship), Judgment as follows: (1) damages for excess rent in the amount of $5,460.00; (2) based on the evidence presented by plaintiffs' expert, the excess rent payments were $1,365 a month, began on June 1, 2000, and ended September 30, 2000 when plaintiff sold his station; prejudgment interest is awarded on these amounts at an annual rate of 2.85% and shall run from the date of each overcharge to the date of entry of judgment; and (3) additional damages in the amount of $100,000.00, with prejudgment interest at an annual rate of 2.75% from December 31, 2003 to the date of entry of judgment.

(iii) As to Count V (Breach of the Lease), Judgment as follows: (1) damages for loss of the STIP subsidy in the amount of $23,271.00; (2) based on the evidence presented by plaintiffs' expert, these lost subsidy amounts averaged $4,654.20 a month, began on January 1, 2000 and ended on June 1, 2000 when plaintiff entered a Motiva lease; prejudgment interest is awarded on these amounts at an annual rate of 12% and shall run from the date each payment would have been made to the date of entry of judgment; and (3) additional damages in the amount of $100,000.00, with prejudgment interest at an annual rate of 12% from December 31, 2003 to the date of entry of judgment.

(iv) As to Count VI (Breach of the Supply Contract–Open Price Term), Judgment in the amount of $25,000.00, with prejudgment interest at an annual

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of Separate Judgment Pursuant to Fed. R. Civ. P 54(b) filed by the parties on January 24, 2006.

rate of 12% from December 31, 2003 to the date of entry of judgment.

(v) Because plaintiff's claims under Count II (Violation of the PMPA based on Constructive Termination of the franchise relationship) and under Count V (Breach of the Lease) sought the same damages for loss of the STIP subsidy and lost business value and the jury awarded the same damages, plaintiff is entitled to recover as to those two awards only once. Because the prejudgment interest rate is different for the two Counts, plaintiff shall be awarded the higher damage award.

3. Judgment in favor of Plaintiff **RAM Corporation, Inc.** against Defendants, Shell Oil Company, Shell Oil Products Company, and Motiva Enterprises LLC, jointly and severally, on Counts II, V, and VI as follows:

(i) As to Count II (Violation of the PMPA based on Constructive Termination of the franchise relationship), Judgment as follows: (1) damages for loss of the STIP subsidy in the amount of $66,011.00; (2) based on the evidence presented by plaintiffs' expert, these lost subsidy amounts began on January 1, 2000, averaged $3,103.75 a month during that year, averaged $5,753.20 from January, 2001 through May 31, 2001, and ended on June 1, 2001 when plaintiff entered into a Motiva lease; prejudgment interest is awarded on these amounts at an annual rate of 3.08% and shall run from the date each payment would have been made to the date of entry of judgment; and (3) additional damages in the amount of $40,000.00, with prejudgment interest at an annual rate of 2.75% from December 31, 2003 to the date of entry of judgment.

(ii) As to Count II (Violation of the PMPA based on Constructive Non-Renewal of the franchise relationship), Judgment as follows: (1) damages for excess rent in the amount of $13,644.00; (2) based on the evidence presented by plaintiffs' expert, the excess rent payments began on June 1, 2001, were $3,411.00 a month from that date through September 30, 2001 when plaintiff sold his station; prejudgment interest is awarded on these amounts at an annual rate of 2.85% and shall run from the date of each overcharge to the date of entry of judgment; and (3) additional damages in the amount of $40,000.00, with prejudgment interest at an annual rate of 2.75% from December 31, 2003 to the date of entry of judgment.

(iii) As to Count V (Breach of the Lease), Judgment as follows: (1) damages for loss of the STIP subsidy in the amount of $66,011.00; (2) based on the evidence presented by plaintiffs' expert, these lost subsidy amounts began on January 1, 2000, averaged $3,103.75 a month during that year, averaged $5,753.20 from January, 2001 through May 31, 2001, and ended on June 1, 2001 when plaintiff entered into a Motiva lease; prejudgment interest is awarded on these amounts at an annual rate of 12% and shall run from the date each payment would have been made to the date of entry of judgment; and (3) additional damages in the amount of $40,000.00, with prejudgment interest at an annual rate of 12% from December 31, 2003 to the date of entry of judgment.

(iv) As to County VI (Breach of the Supply Contract–Open Price Term), Judgment in the amount of $135,940.00 with prejudgment interest at an annual rate of 12% from December 31, 2003 to the date of entry of judgment.

(v) Because plaintiff's claims under Count II (Violation of the PMPA based on Constructive Termination of the franchise relationship) and under Count V (Breach of the Lease) sought the same damages for loss of the STIP subsidy and lost business value and the jury awarded the same damages, plaintiff is entitled to recover as to those two awards only once. Because the prejudgment interest rate is different for the two Counts, plaintiff shall be awarded the higher damage award.

4. Judgment in favor of Plaintiff **Stephen Pisarczyk** against Defendants, Shell Oil Company, Shell Oil Products Company, and Motiva Enterprises LLC, jointly and severally, on Counts II, V, and VI as follows:

(i) As to Count II (Violation of the PMPA based on Constructive Termination of the franchise relationship), Judgment as follows: (1) damages for loss of the STIP subsidy in the amount of $19,557.00; (2) based on the evidence presented by plaintiffs' expert, these lost subsidy amounts began on January 1, 2000, averaged $2,793.00 a month, and ended on August 1, 2000; prejudgment interest is awarded on the amounts at an annual rate of 3.08% and shall run from the date each payment would have been made to the date of entry of judgment; (3) damages at an annual rate of 2.75% from December 31, 2003 to the date of entry of judgment; and (4) additional damages in the amount of $50,000.00, with prejudgment interest at an annual rate of 2.75% from December 31, 2003 to the date of entry of judgment.

(ii) As to Count II (Violation of the PMPA based on Constructive Non-Renewal of the franchise relationship), Judgment as follows: (1) damages for lost business value in the amount of $46,991.00 and additional damages in the amount of $50,000; and

(2) prejudgment interest on the $96,991.00 shall be at an annual rate of 2.75% from December 31, 2003 to the date of entry of judgment.

(iii) As to Count V (Breach of the Lease), Judgment as follows: (1) damages for loss of the STIP subsidy in the amount of $19,557.00; (2) based on the evidence presented by plaintiffs' expert, these lost subsidy amounts began on January 1, 2000, averaged $2,793.00 a month, and ended on August 1, 2000; prejudgment interest is awarded on these amounts at an annual rate of 12% and shall run from the date each payment would have been made to the date of entry of judgment; (3) damages for lost business value in the amount of $46,991.00, with prejudgment interest at an annual rate of 12% from December 31, 2003 to the date of entry of judgment; and (4) additional damages in the amount of $50,000.00, with prejudgment interest at an annual rate of 12% from December 31, 2003 to the date of entry of judgment.

(iv) As to County VI (Breach of the Supply Contract–Open Price Term), Judgment in the amount of $62,142.00, with prejudgment interest at an annual rate of 12% from December 31, 2003 to the date of entry of judgment.

(v) Because plaintiff's claim under Count II (Violation of the PMPA based on Constructive Termination of the franchise relationship) and under Count V (Breach of the Lease) sought the same damages for loss of the STIP subsidy and lost business value and the jury awarded the same damages, plaintiff is entitled to recover as to those two awards only once. Because the prejudgment interest rate is different for the two Counts, plaintiff shall be awarded the higher damage award.

5. Judgment in favor of Plaintiff **Cynthia Karol** against Defendants, Shell Oil Company, Shell Oil Products Company, and Motiva Enterprises LLC, jointly and severally, on Counts II, V, and VI as follows:

(i) As to Count II (Violation of the PMPA based on Constructive Termination of the franchise relationship), Judgment as follows: (1) damages for loss of the STIP subsidy in the amount of $41,257.00; (2) based on the evidence presented by plaintiffs' expert, these lost subsidy amounts began on January 1, 2000, averaged $3,380.42 a month during that year, were $692.00 in January, 2001, and ended on February 1, 2001 when plaintiff entered into a Motiva lease; prejudgment interest is awarded on these amounts at an annual rate of 3.08% and shall run from the date each payment would have been made to the date of entry of judgment; and (3) damages for lost business value in the amount of $78,290.00, with prejudgment interest at an annual rate of 2.75% from December 31, 2003 to the date of entry of judgment.

(ii) As to Count II (Violation of the PMPA based on Constructive Non-Renewal of the franchise relationship), Judgment as follows: (1) damages for excess rent in the amount of $86,557.00; (2) based on the evidence presented by plaintiffs' expert, the excess rent payments began on February 1, 2001, were $2,249.00 a month from that date through January 31, 2002, were $2,479.00 a month from February 1, 2002 th[r]ough January 31, 2003, and were $2,711 a month from February 1, 2003 th[r]ough December 31, 2003; prejudgment interest is awarded on these amounts at an annual rate of 2.85% and shall run from the date of each overcharge to the date of entry of judgment; and

(3) damages for lost business value in the amount of $78,290.00, with prejudgment interest at an annual rate of 2.75% from December 31, 2003 to the date of entry of judgment.

(iii) As to Count V (Breach of Lease), Judgment as follows: (1) damages for loss of the STIP subsidy in the amount of $41,257.00; (2) based on the evidence presented by plaintiffs' expert, these lost subsidy amounts began on January 1, 2000, averaged $3,380.42 a month during that year, were $692.00 in January, 2001, and ended on February 1, 2001 when plaintiff entered into a Motiva lease; prejudgment interest is awarded on these amounts at an annual rate of 12% and shall run from the date each payment would have been made to the date of entry of judgment; and (3) damages for lost business value in the amount of $78,290.00, with interest at an annual rate of 12% from December 31, 2003 to the date of entry of judgment.

(iv) As to Count VI (Breach of the Supply Contract–Open Price Term), Judgment in the amount of $117,578.00, with prejudgment interest at an annual rate of 12% from December 31, 2003 to the date of entry of judgment.

(v) Because plaintiff's claims under Count II (Violation of the PMPA based on Constructive Termination of the franchise relationship) and under Count V (Breach of the Lease) sought the same damages for loss of the STIP subsidy and lost business value and the jury awarded the same damages, plaintiff is entitled to recover as to those two awards only once. Because the prejudgment interest rate is different for the two Counts, plaintiff shall be awarded the higher damage award.

6. Judgment in favor of Plaintiff **Mac's Shell Service, Inc., Southbridge Shell**, against Defendants, Shell Oil Company, Shell Oil Products Company, and Motiva Enterprises LLC, jointly and severally, on Counts II, V, and VI as follows:

(i) As to Count II (Violation of the PMPA based on Constructive Termination of the franchise relationship), Judgment as follows: (1) damages for loss of the STIP subsidy in the amount of $58,602.00; (2) based on the evidence presented by plaintiffs' expert, these lost subsidy amounts began on January 1, 2000, averaged $2,919.25 a month during that year, averaged $2,357.10 a month from January 1, 2001 through October 31, 2001, and ended on November 1, 2001 when plaintiff entered into a Motiva lease; prejudgment interest is awarded on these amounts at an annual rate of 3.08% and shall run from the date each payment would have been made to the date of entry of judgment; and (3) damages for lost business value in the amount of $99,962.00, with prejudgment interest at an annual rate of 2.75% from December 31, 2003 to the date of entry of judgment.

(ii) As to Count II (Violation of the PMPA based on Constructive Non-Renewal of the franchise relationship), Judgment as follows: (1) damages for excess rent in the amount of $80,220.00; (2) based on the evidence present by plaintiffs' expert, the excess rent payments began on November 1, 2001, were $2,950.00 a month from that date through October 31, 2002, were $3,170.00 a month from November 1, 2002 th[r]ough October 31, 2003, and were $3,389.00 a month from November 1, 2003 th[r]ough December 31, 2003; prejudgment interest is awarded on these amounts at an annual rate

of 2.85% and shall run from the date of each overcharge to the date of entry of judgment; and (3) damages for lost business value in the amount of $99,962.00, with prejudgment interest at an annual rate of 2.75% from December 31, 2003 to the date of entry of judgment.

(iii) As to Count V (Breach of the Lease), Judgment as follows: (1) damages for loss of the STIP subsidy in the amount of $58,602.00; (2) based on the evidence presented by plaintiffs' expert, these lost subsidy amounts began on January 1, 2000, averaged $2,919.25 a month during that year, averaged $2,357.10 a month from January 1, 2001 through October 31, 2001, and ended on November 1, 2001 when plaintiff entered into a Motiva lease; prejudgment interest is awarded on these amounts at an annual rate of 12% and shall run from the date each payment would have been made to the date of entry of judgment; and (3) damages for lost business value in the amount of $99,962.00, with prejudgment interest at an annual rate of 12% from December 31, 2003 to the date of entry of judgment.

(iv) As to Count VI (Breach of the Supply Contract–Open Price Term), Judgment in the amount of $181,355.00, with prejudgment interest at an annual rate of 12% from December 31, 2003 to the date of entry of judgment.

(v) Because plaintiff's claims under Count II (Violation of the PMPA based on Constructive Termination of the franchise relationship) and under Count V (Breach of the Lease) sought the same damages for loss of the STIP subsidy and lost business value and the jury awarded the same damages, plaintiff is entitled to recover as to those two awards only once. Because the prejudgment

interest rate is different for the two Counts, plaintiff shall be awarded the higher damages award.

7. Judgment in favor of Plaintiff **Mac's Shell Service, Inc., Webster Shell**, against Defendants, Shell Oil Company, Shell Oil Products Company, and Motiva Enterprises LLC, jointly and severally, on Counts II, V, and VI as follows:

(i) As to Count II (Violation of the PMPA based on Constructive Termination of the franchise relationship), Judgment as follows: (1) damages for loss of the STIP subsidy in the amount of $89,335.00; (2) based on the evidence presented by plaintiffs' expert, these lost subsidy amounts began on January 1, 2000, averaged $3,885.50 a month during that year, averaged $4,270.90 a month from January 1, 2001 through October 31, 2001, and ended on November 1, 2001 when plaintiff entered into a Motiva lease; prejudgment interest is awarded on these amounts at an annual rate of 3.08% and shall run from the date each payment would have been made to the date of entry of judgment; and (3) damages for lost business value in the amount of $97,247.00, with prejudgment interest at an annual rate of 2.75% from December 31, 2003 to the date of entry of judgment.

(ii) As to Count II (Violation of the PMPA based on Constructive Non-Renewal of the franchise relationship), Judgment as follows: (1) damages for excess rent in the amount of $68,186.00; (2) based on the evidence presented by plaintiffs' expert, the excess rent payments began on November 1, 2001, were $2,425.00 a month from that date through October 31, 2002, were $2,746.00 a month from November 1, 2002 th[r]ough October 31, 2003, and

were $3,067.00 a month from November 1, 2003 th[r]ough December 31, 2003; prejudgment interest is awarded on these amounts at an annual rate of 2.85% and shall run from the date of each overcharge to the date of entry of judgment; and (3) damages for lost business value in the amount of $97,247.00 with prejudgment interest at an annual rate of 2.75% from December 31, 2003 to the date of entry of judgment.

(iii) As to Count V (Breach of the Lease), Judgment as follows: (1) damages for loss of the STIP subsidy in the amount of $89,335.00; (2) based on the evidence presented by plaintiffs' expert, these lost subsidy amounts began on January 1, 2000, averaged $3,885.50 a month during that year, averaged $4,270.90 a month from January 1, 2001 through October 31, 2001, and ended on November 1, 2001 when plaintiff entered into a Motiva lease; prejudgment interest is awarded on these amounts at an annual rate of 12% and shall run from the date each payment would have been made to the date of entry of judgment; and (3) damages for lost business value in the amount of $97,247.00, with prejudgment interest at an annual rate of 12% from December 31, 2003 to the date of entry of judgment.

(iv) As to Count VI (Breach of the Supply Contract–Open Price Term), Judgment in the amount of $106,609.00, with prejudgment interest at an annual rate of 12% from December 31, 2003 to the date of entry of judgment.

(v) Because plaintiff's claims under Count II (Violation of the PMPA based on Constructive Termination of the franchise relationship) and under Count V (Breach of the Lease) sought the same damages for loss of the STIP subsidy and lost

business value and the jury awarded the same damages, plaintiff is entitled to recover as to those two awards only once. Because the prejudgment interest rate is different for the two Counts, plaintiff shall be awarded the higher damage award.

8. Judgment in favor of Plaintiff **J&M Avramidis, Inc.** against Defendants, Shell Oil Company, Shell Oil Products Company, and Motiva Enterprises LLC, jointly and severally, on Counts II, V, and VI as follows:

(i) As to Count II (Violation of the PMPA based on Constructive Termination of the franchise relationship), Judgment as follows: (1) damages for loss of the STIP subsidy in the amount of $50,388.00; (2) based on the evidence presented by plaintiffs' expert, these lost subsidy amounts began on January 1, 2000, averaged $1,866.22 a month through March 31, 2002, and ended on April 1, 2002 when plaintiff entered into a Motiva lease; prejudgment interest is awarded on these amounts at an annual rate of 3.08% and shall run from the date each payment would have been made to the date of entry of judgment; and (3) damages for lost business value in the amount of $105,318.00, with prejudgment of interest at an annual rate of 2.75% from December 31, 2003 to the date of entry of judgment.

(ii) As to Count II (Violation of the PMPA based on Constructive Non-Renewal of the franchise relationship), Judgment as follows: (1) damages for excess rent in the amount of $63,192.00; (2) based on the evidence presented by plaintiffs' expert, the excess rent payments began on April 1, 2002, were $2,992.00 a month from that date through March 31, 2003, and were $3,032.00 a month from April 1, 2003 th[r]ough December 31, 2003; prejudgment interest is awarded on these amounts at an annual

rate of 2.85% and shall run from the date of each overcharge to the date of entry of judgment; and (3) damages for lost business value in the amount of $105,318.00, with prejudgment interest at an annual rate of 2.75% from December 31, 2003 to the date of entry of judgment.

(iii) As to Count V (Breach of the Lease), Judgment as follows: (1) damages for loss of the STIP subsidy in the amount of $50,388.00; (2) based on the evidence presented by plaintiffs' expert, these lost subsidy amounts began on January 1, 2000, averaged $1,866.22 a month through March 31, 2002, and ended on April 1, 2002 when plaintiff entered into a Motiva lease; prejudgment interest shall be awarded on these amounts at an annual rate of 12% and shall run from the date each payment would have been made to the date of entry of judgment; and (3) damages for lost business value in the amount of $105,318.00, with prejudgment interest at an annual rate of 12% from December 31, 2003 to the date of entry of judgment.

(iv) As to Count VI (Breach of the Supply Contract–Open Price Term), Judgment in the amount of $98,824.00, with prejudgment interest at an annual rate of 12% from December 31, 2003 to the date of entry of judgment.

(v) Because plaintiff's claims under Count II (Violation of the PMPA based on Constructive Termination of the franchise relationship) and under Count V (Breach of the Lease) sought the same damages for loss of the STIP subsidy and lost business value and the jury awarded the same damages, plaintiff is entitled to recover as to those two awards only once. Because the prejudgment interest rate is different for the two Counts, plaintiff shall be awarded the higher damage award.

9. Judgment in favor of Plaintiff **Sid Prashad** against Defendants, Shell Oil Company, Shell Oil Products Company, and Motiva Enterprises LLC, jointly and severally, on Counts II, V, and VI as follows:

(i) As to Count II (Violation of the PMPA based on Constructive Termination of the franchise relationship), Judgment as follows: (1) damages for loss of the STIP subsidy in the amount of $17,008.00; (2) based on the evidence presented by plaintiffs' expert, these lost subsidy amounts began on January 1, 2000, averaged $2,429.71 a month through July 31, 2000, and ended on August 1, 2000 when plaintiff entered into a Motiva lease; prejudgment interest is awarded on these amounts at an annual rate of 3.08% and shall run from the date each payment would have been made to the date of entry of judgment; and (3) damages for lost business value in the amount of $85,830.00, with prejudgment interest at an annual rate of 2.75% from December 31, 2003 to the date of entry of judgment.

(ii) As to Count II (Violation of the PMPA based on Constructive Non-Renewal of the franchise relationship), Judgment as follows: (1) damages for excess rent in the amount of $100,922.00; (2) based on the evidence presented by plaintiffs' expert, the excess rent payments began on August 1, 2000, were $2,159.00 a month from that date through July 31, 2001, were $2,429.00 a month from August 1, 2001 th[r]ough July 31, 2002, and were $2,698.00 a month from August 1, 2002 th[r]ough December 31, 2003; prejudgment interest is awarded on these amounts at an annual rate of 2.85% and shall run from the date of the overcharge to the date of entry of judgment; and (3) damages for lost business value in the amount of $85,830.00, with pre-

judgment interest at an annual rate of 2.75% from December 31, 2003 to the date of entry of judgment.

(iii) As to Count V (Breach of the Lease), Judgment as follows: (1) damages for loss of the STIP subsidy in the amount of $17,008.00; (2) based on the evidence presented by plaintiffs' expert, these lost subsidy amounts began on January 1, 2000, averaged $2,429.71 a month through July 31, 2000, and ended on August 1, 2000 when plaintiff entered into a Motiva lease; prejudgment interest is awarded on these amounts at an annual rate of 12% and shall run from the date each payment would have been made to the date of entry of judgment; and (3) damages for lost business value in the amount of $85,830.00, with prejudgment interest at an annual rate of 12% from December 31, 2003 to the date of entry of judgment.

(iv) As to Count VI (Breach of the Supply Contract–Open Price Term), Judgment in the amount of $69,270.00, with prejudgment interest at an annual rate of 12% from December 31, 2003 to the date of entry of judgment.

(v) Because plaintiff's claims under Count II (Violation of the PMPA based on Constructive Termination of the franchise relationship) and under Count V (Breach of the Lease) sought the same damages for loss of the STIP subsidy and lost business value and the jury awarded the same damages, plaintiff is entitled to recover as to those two awards only once. Because the prejudgment interest rate is different for the two Counts, plaintiff shall be awarded the higher damage award.

10. Judgment in favor of Plaintiff **Akmal, Inc.** against Defendants, Shell Oil Company, Shell Oil Products Com-

pany, and Motiva Enterprises LLC, jointly and severally, on Counts II, V, and VI as follows:

(i) As to Count II (Violation of the PMPA based on Constructive Termination of the franchise relationship), Judgment as follows: (1) damages for loss of the STIP subsidy in the amount of $173,198.00; (2) based on the evidence presented by plaintiffs' expert, these lost subsidy amounts began on January 1, 2000, averaged $3,626.91 a month during that year, averaged $3,552.25 a month during 2001, and averaged $3,627.00 a month during 2002 and 2003; prejudgment interest is awarded on these amounts at an annual rate of 3.08% and shall run from the date the payment would have been made to the date of entry of judgment; and (3) damages for lost business value in the amount of $44,573.00, with prejudgment interest at an annual rate of 2.75% from December 31, 2003 to the date of entry of judgment.

(ii) As to Count II (Violation of the PMPA based on Constructive Non-Renewal of the franchise relationship), Judgment as follows: (1) damages for lost business value in the amount of $44,573.00; and (2) prejudgment interest on the $44,573.00 shall be at an annual rate of 2.75% from December 31, 2003 to the date of entry of judgment.

(iii) As to Count V (Breach of the Lease), Judgment as follows: (1) damages for loss of the STIP subsidy in the amount of $173,198.00; (2) based on the evidence presented by plaintiffs' expert, these lost subsidy amounts began on January 1, 2000, averaged $3,626.91 a month during that year, averaged $3,552.25 a month during 2001, and averaged $3,627.00 a month during 2002 and 2003; prejudgment interest is awarded on these amounts at an annual rate of 12% and shall run from the date the

payment would have been made to the date of entry of judgment; and (3) damages for lost business value in the amount of $44,573.00, with prejudgment interest at an annual rate of 12% from December 31, 2003 to the date of entry of judgment.

(iv) As to Count VI (Breach of the Supply Contract–Open Price Term), Judgment in the amount of $42,264.00, with prejudgment interest at an annual rate of 12% from December 31, 2003 to the date of entry of judgment.

(v) Because plaintiff's claims under Count II (Violation of the PMPA based on Constructive Termination of the franchise relationship) and under Count V (Breach of the Lease) sought the same damages for loss of the STIP subsidy and lost business value and the jury awarded the same damages, plaintiff is entitled to recover as to those two awards only once. Because the prejudgment interest rate is different for the two Counts, plaintiff shall be awarded the higher damage award.

11. In summary, the damages amounts for each of the preceding plaintiffs are as follows[2]:

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[2] A chart showing the breakdown of the damages calculations for each of the counts for each plaintiff is attached as Exhibit A to this Order. In particular, the damages awarded for Count II (Constructive Termination) are duplicative of the damages awarded for Count V (Breach of Lease), so only one of these damages amounts can be awarded.

Plaintiff	Principal and Interest through 9/30/06	Daily Interest from 9/30/06
Sullivan	$326,11.71	$78.31
RAM	$413,550.96	$121.11
Pisarczyk	$355,450.15	$90.40
Karol	$520,780.93	$125.52
Mac's Shell (Southbridge)	$680,347.51	$174.05
Mac's Shell (Webster)	$612,817.85	$155.95
J&M Avrimidis	$546,392.93	$133.38
Prashad	$447,122.28	$95,04
Akmal, Inc.	$445,459.83	$134.29

12. Judgment in favor of Defendants, Shell Oil Company, Shell Oil Products Company, and Motiva Enterprises LLC against Plaintiffs, **John A. Sullivan**, **RAM Corporation, Inc.**, **Stephen Pisarczyk**, **Cynthia Karol**, **Mac's Shell Service, Inc. (Southbridge and Webster)**, **J&M Avramidis, Inc.**, **Sid Prashad**, and **Akmal, Inc.** as to Counts I (Request for injunctive relief), III (Violation of M.G.L. Chapter 93A), IV (Violation of M.G.L. Chapter 93E), VII (Breach of Implied Warranty of Good Faith and Fair Dealing), VIII (Promissory Estoppel), and IX (Declaratory Judgment).

13. Judgment in favor of Defendants, Shell Oil Company, Shell Oil Products Company, and Motiva Enterprises LLC, against Plaintiff **Three K's, Inc.** as to all claims (Counts I-IX).

14. The Judgment (compensatory damages plus accrued prejudgment interest) will bear post judgment in-

terest at the judgment rate specified by 28 U.S.C. sec. 1961 until fully satisfied.

15. All relief not expressly granted is denied.

16. This Court shall retain jurisdiction of this matter for purposes of the enforcement of the provisions of this Judgment.

SO ORDERED:

/s/ Rya W. Zobel
Hon. Rya W. Zobel
United States District Judge

DATED: [October 27, 2006]

APPENDIX C
UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 01-11300-RWZ

FRANCIS MARCOUX, ET AL.,

v.

SHELL OIL PRODUCTS CO., INC.
AND MOTIVA ENTERPRISES, LLC

ORDER ON TRIAL AND POST-TRIAL MOTIONS

September 19, 2005

ZOBEL, D.J.

Sixty Shell Oil dealers brought this action for breach of contract and violations of the Petroleum Marketing Practices Act ("PMPA"). Because the individual claims are, for the most part, unique, the case is not amenable to class action treatment. The Court did, however, order an initial trial of the claims of ten plaintiffs which was held from November 15 to December 8, 2004 and resulted in a verdict for those plaintiffs.[1]

Plaintiff's motion for limited reconsideration of the entry of summary [judgment] against plaintiff Stephen Pisarczyk (#296 on the docket)

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[1] Sixty plaintiffs filed suit. Eighteen voluntarily dismissed their claims in 2002. From the remainder, the Court randomly selected ten for the first trial. One settled on the eve of trial, and the other nine tried to verdict.

The motion was denied.

Defendants' motion for reconsideration of the decision on their motion for summary judgment (#297 on the docket)

The motion was denied.

Defendants' motion in limine regarding damages evidence (#298 on the docket)

The motion is denied as moot.

Defendants' motion in limine to exclude the proposed expert testimony of Brian Gorin (#299 on the docket)

The motion was denied.

Defendants' motion in limine regarding evidence relating to defendants' pricing to non-lessee dealers (#302 on the docket)

The motion is denied as moot.

Plaintiffs' motion for special verdict (#314 on the docket)

The motion was allowed.

Defendants' motion for judgment as a matter of law (#322 on the docket)

The Court reserved on the motion and will revisit it in connection with its renewal #352.

Defendants' supplemental motion for special verdict (#329 on the docket)

The motion was denied as to the form of defendants' proposal, although the Court submitted special questions to the jury.

Defendants' motion for special verdict (#350 on the docket)

The motion was allowed.

Defendants' motion for jury instructions (#351 on the docket)

The motion was allowed in part and denied in part.

Both parties also filed a number of post-trial motions and proposed findings and rulings addressed below.

Plaintiffs' motion for a permanent injunction (#341 on the docket)

The motion is denied. Neither the PMPA nor the record in this case support the requested recalculation of rent.

Plaintiffs' motion for an award of punitive damages for willfulness under the PMPA (#342 on the docket)

The motion is denied. Although the jury found constructive termination and constructive non-renewal of certain lease agreements, I am not convinced that defendants acted in willful disregard of the PMPA and that punitive damages are appropriate. The evidence showed at least two reasons for defendants' conduct that mitigate against the imposition of exemplary damages.

First, the entire industry was changing the manner of computing rent. Whereas Shell and some others had based the amount of rent on the amount of gas purchased, the industry and defendants switched to a formulation based on the value of the station's real estate. That decision followed a change in the use of gas stations from simply selling gasoline and oil to including also convenience stores and other amenities. It also reflected a reasonable business decision to improve defendants' return on their investment in the real estate.

Second, during the period in question, Shell had merged with Texaco, and the combined company had to evolve a uniform rent structure. These business realities were, at least, partially responsible for the rent program of which plaintiff complained, and they compel denial of any award of punitive damages.

Plaintiffs' proposed findings of fact and rulings of law on Count III (#343 on the docket)

In order to establish a violation of Mass. Gen. Laws ch. 93A, § 11, plaintiffs "must show that the defendant[s'] actions fell 'within at least the penumbra of some common-law, statutory, or other established concept of unfairness,' or were 'immoral, unethical, oppressive or unscrupulous' . . ." *Damon v. Sun Co., Inc.*, 87 F.3d 1467, 1484 (1st Cir. 1996). For the same reasons that defendants are not liable for willful disregard and punitive damages under the PMPA, I find the defendants not liable on Count III.

Defendants' motion for judgment as a matter of law, or, in the alternative, for a new trial (#352 on the docket)

Defendants again raise a number of legal issues concerning the viability of plaintiffs' claims. I have previously addressed them in the context of a motion for summary judgment, rulings on evidence and defendants' motions during trial under Rule 50. I adhere to those rulings.

Defendants' arguments that the verdict is not supported by the evidence ignores the jury's right to draw conclusions from the evidence different from the conclusions the parties might reach. The jury is not required to accept calculations by the parties' experts. It may make its own calculations based on the evidence even if they lead to a result different from that reached by the expert. The evidence in this case permitted the jury's findings both as to liability and damages.

Defendants' complain that they were not allowed sufficient time to present their case. First, the Court explained to all counsel before the case began the strictures on time, namely, that there would be fourteen trial days. Second, while it is true that plaintiffs used more time than allotted, a not insignificant part of the excess was attributable to lengthy cross-examination by defendants.

Defendants' motion for judgment as a matter of law is denied as is the alternative, their motion for a new trial.

Defendant's motion for leave to file memorandum in excess of 20 pages (#353 on the docket)

The motion is allowed.

Plaintiffs' motion for leave to file reply (#354 on the docket)

The motion is allowed.

Plaintiffs' motion to file brief in excess of twenty pages (#361 on the docket)

The motion is allowed.

Defendants' motion for leave to file a reply (#365 on the docket)

The motion is allowed.

[Sept. 19, 2005]
DATE

/s/ Rya W. Zobel
RYA W. ZOBEL
UNITED STATES DISTRICT JUDGE

APPENDIX D
UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 01-11300-RWZ

FRANCIS MARCOUX, ET AL.,

v.

SHELL OIL PRODUCTS CO., INC.
AND MOTIVA ENTERPRISES LLC

MEMORANDUM OF DECISION

October 7, 2002

ZOBEL, D.J.

On June 30, 2000, lessee-dealers of Shell brand automobile gasoline, acting through the Shell Dealers Defense Group ("Group"), and other individual franchisees, filed an action against Shell Oil Products Company and Motiva Enterprises ("defendants") for numerous causes of action centered on the defendants' termination of its Variable Rent Program ("VRP"). *See Demetrios Tsaniklides, Jr., et al. v. Shell Oil Products Co., Inc. and Motiva Enterprises, LLC*, Civil Action No. 00-11295. After the Court determined that the Group did not have standing, the lessee-dealers sought to amend the complaint to add themselves in their individual capacities. On June 12, 2001, the Court denied the motion, but stated that plaintiffs "may file a new case which may be deemed to be related." On the same day, the Court ordered that the

cases involving the Rhode Island plaintiffs and New Hampshire plaintiffs be transferred to their respective states. The remaining parties subsequently stipulated to a dismissal of the action without prejudice. The present action seeking the same relief was then filed on July 27, 2001. Defendants have filed a Motion to Dismiss and a Motion for Judgment on the Pleadings.

Defendants contend that Counts One and Two of plaintiffs' Amended Complaint concerning constructive termination are barred by the one-year statute of limitations under the Petroleum Marketing Practices Act, 15 U.S.C. § 2805 ("PMPA"). Defendants assert that the statute of limitations began to run when Shell terminated the VRP on August 1, 1998, while plaintiffs allege that it began on January 1, 2000, when the VRP substitute was eliminated. Count One of the Amended Complaint states that plaintiffs seek injunctive relief on the grounds that the "dealers' franchises have been constructively terminated by Shell's termination of the Variable Rent Program or a similar alternative. . . ." (Paragraph 49, Subparagraph 1.) Count Two incorporates the same statement by reference. Paragraph 42 of the Amended Complaint states that Shell/Motiva abandoned the last substitution of the VRP on January 1, 2000 and began to charge "Contract Rent" or the new "Program Rent."

Viewing the facts as stated in the Amended Complaint in a light most favorable to the plaintiffs, the statute of limitations for the PMPA claims began to run on January 1, 2000. Plaintiffs then filed suit on June 30, 2000, well within the one-year statute of limitations. Since the present suit is deemed to relate back to the date of the original complaint in accordance with the Court's order dated June 12, 2001, plaintiffs' PMPA claims are not time barred. In fact, none of plaintiffs' claims, including the state law claims, is barred by the PMPA's statute of limi-

tations. Similarly, plaintiffs' claims under M.G.L. ch. 93E are timely.

Defendants also contend that the Rhode Island plaintiffs (except for Paul Sroczynski and his corporation, J. Enterprises) and the New Hampshire plaintiffs (except for Charles Lagasse, Kach Corporation and Ali Jaber), who did not file suit individually in the first action, are time barred. However, both sets of plaintiffs were parties to the first action as members of the Group. The Court ordered that the cases involving those out-of-state plaintiffs be transferred to their respective states pursuant to 28 U.S.C. § 1406(a). Because those actions relate back to the date of the first action, they, too, are timely.

Defendants' motion to dismiss plaintiffs' claim for fraud and misrepresentation is allowed. "In the First Circuit, Rule 9(b) requires a party pleading fraud to specify the time, place, and content of the alleged false representation." *Mead Corp. v. Stevens Cabinets, Inc.*, 938 F. Supp. 87, 90 (D. Mass. 1996). Paragraph 31 of the plaintiffs' amended complaint states that "[f]or over 18 years, the dealers received assurances from the highest levels of the marketing department on down to the field sales representatives, that the VRP would always be there for them. . . ." Plaintiffs have not specified either the time or place of defendants' misrepresentations regarding the VRP as required.

Finally, defendants' assertion that allegations of constructive termination of the franchise are not covered by the PMPA is simply wrong. *See Riverdale Enterprises Inc. v. Shell Oil Co.*, 41 F. Supp. 2d 56, 62 (D. Mass. 1999) (stating that "[a]bsent a claim of per se unlawful termination, a PMPA franchisee must show that a constructive termination has occurred.").

Accordingly, the defendants' Motion to Dismiss and Motion for Judgment on the Pleadings as to the plain-

tiffs' fraud and misrepresentation claim is allowed. As to all other claims, the motions are denied.

[October 7, 2002]
DATE

/s/ Rya W. Zobel
RYA W. ZOBEL
UNITED STATES DISTRICT JUDGE

APPENDIX E
UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 05-2771

FRANCIS MARCOUX; ABRAHAM ABRAHAM; JORDAN AVRAMIDIS; CHRISS AZZIAN; RICHARD BAIMA; ED BAKER; STEVE BLACK; JAMES COGGESHALL; MICHAEL CORBETT; PATRICIA DASILVA; ALEX DASILVA; STEVE FALCONE; GEORGE FONTAINE; BILL FONTAINE; CAMILLE FRANCIS; MATTY GAETA; DONALD GAGNON; JOHN GENEROSO; KAL HAMZE; ABRAHAM HAMZE; TIBOR HANGYAL; ADAM HIPP; ABDUL KAFAL; GEORGE KANTARGES; JIM KANTAROWSKI; WILLIAM KAUFMAN; JOE KELLEHER; HUSSEIN KOBESSI; MIKE LAMARCHE; RICHARD MELANSON; AKMAL MOAWED; CONSTANTIN PIEDES; STEPHAN PISARCYK; HARVEY RUDNICK; ROGER THIBAULT; DIMITRIOUS TSANIKILIDES; STEPHEN SHEA; JOHN A. SULLIVAN; J. ENTERPRISE, INC.; NIKOLAS MANOUSARIDIS; PAUL SROCZYNSKI, PRESIDENT OF J. ENTERPRISES, INC.; JES SERVICE, INC.; RONNIE ABOUD; MAHENDRS AMIN; MASSOUD ATALISH; MIKE ATALISH; DOUGLAS CHAPMAN; STEVE FRANGIAS; JOE GOLDEN; KAL HAMZE; PATRICK HINES; MUHAMMAD IMTIAZ; JAY JON; KAY JON; JACQUE KAAN; HUSSEIN KOBESSI; JAMES MORAIDIS; SUNNY PATEL; RUSSELL PICARD; PAUL RICHARDS; FRED SAAD; AZIZ SABA; WALIF SAMROUT; EARL STICKNEY; THOMAS SULLIVAN; TOUFIC ATALLAH; DROR DUSDUSHMAN; EARL MCLAUGHLIN; WILSON TIBURTINO; LASCOENTERPRISES, INC.; LARRY RUBENSEIN, PRESIDENT OF LASCO ENTERPRISES,

Plaintiffs,

CYNTHIA KAROL; SID PARSHAD; JOHN A. SULLIVAN; MAC'S SHELL SERVICE, INC.; RAM CORPORATION, INC.; J&M AVRAMIDIS, INC.; AKMAL, INC.; THREE K'S, INC.; STEPHEN PISARCZYK,

Plaintiffs-Appellees,

v.

SHELL OIL PRODUCTS COMPANY LLC; MOTIVA ENTERPRISES LLC; SHELL OIL COMPANY, INC.,

Defendants-Appellants.

Before

Boudin, Chief Judge,
Torruella, Lynch,
Lipez and Howard,
Circuit Judges,
Delgado-Colon,* District Judge.

ORDER OF COURT

Entered: **May 23, 2008**

The petition for rehearing having been denied by the panel of judges who decided the case, and the petition for rehearing en banc have been submitted to the active judges of this court and a majority of the judges not having voted that the case be heard en banc, it is ordered that the petition for rehearing and the petition for rehearing en banc be *denied.*

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* Of the U.S. District Court for the District of Puerto Rico, sitting by designation.

By the Court:

/s/ Richard Cushing Donovan, Clerk

APPENDIX F
RELEVANT STATUTORY PROVISIONS

Title I of the Petroleum Marketing Practices Act, Pub. L. No. 95-297, 92 Stat. 322, 322 (1978) (codified as amended at 15 U.S.C. §§ 2801-2806) provides as follows:

§ 2801. Definitions

As used in this subchapter:

(1)(A) The term "franchise" means any contract—

(i) between a refiner and a distributor,

(ii) between a refiner and a retailer,

(iii) between a distributor and another distributor, or

(iv) between a distributor and a retailer,

under which a refiner or distributor (as the case may be) authorizes or permits a retailer or distributor to use, in connection with the sale, consignment, or distribution of motor fuel, a trademark which is owned or controlled by such refiner or by a refiner which supplies motor fuel to the distributor which authorizes or permits such use.

(B) The term "franchise" includes—

(i) any contract under which a retailer or distributor (as the case may be) is authorized or permitted to occupy leased marketing premises, which premises are to be employed in connection with the sale, consignment, or distribution of motor fuel under a trademark which is owned or controlled by such refiner or by a refiner which supplies motor fuel to the distributor which authorizes or permits such occupancy;

(ii) any contract pertaining to the supply of motor fuel which is to be sold, consigned or distributed—

(I) under a trademark owned or controlled by a refiner; or

(II) under a contract which has existed continuously since May 15, 1973, and pursuant to which, on May 15, 1973, motor fuel was sold, consigned or distributed under a trademark owned or controlled on such date by a refiner; and

(iii) the unexpired portion of any franchise, as defined by the preceding provisions of this paragraph, which is transferred or assigned as authorized by the provisions of such franchise or by any applicable provision of State law which permits such transfer or assignment without regard to any provision of the franchise.

(2) The term "franchise relationship" means the respective motor fuel marketing or distribution obligations and responsibilities of a franchisor and a franchisee which result from the marketing of motor fuel under a franchise.

(3) The term "franchisor" means a refiner or distributor (as the case may be) who authorizes or permits, under a franchise, a retailer or distributor to use a trademark in connection with the sale, consignment, or distribution of motor fuel.

(4) The term "franchisee" means a retailer or distributor (as the case may be) who is authorized or permitted, under a franchise, to use a trademark in connection with the sale, consignment, or distribution of motor fuel.

(5) The term "refiner" means any person engaged in the refining of crude oil to produce motor fuel, and includes any affiliate of such person.

(6) The term "distributor" means any person, including any affiliate of such person, who—

(A) purchases motor fuel for sale, consignment, or distribution to another; or

(B) receives motor fuel on consignment for consignment or distribution to his own motor fuel ac-

counts or to accounts of his supplier, but shall not include a person who is an employee of, or merely serves as a common carrier providing transportation service for, such supplier.

(7) The term "retailer" means any person who purchases motor fuel for sale to the general public for ultimate consumption.

(8) The term "marketing premises" means, in the case of any franchise, premises which, under such franchise, are to be employed by the franchisee in connection with sale, consignment, or distribution of motor fuel.

(9) The term "leased marketing premises" means marketing premises owned, leased, or in any way controlled by a franchisor and which the franchisee is authorized or permitted, under the franchise, to employ in connection with the sale, consignment, or distribution of motor fuel.

(10) The term "contract" means any oral or written agreement. For supply purposes, delivery levels during the same month of the previous year shall be prima facie evidence of an agreement to deliver such levels.

(11) The term "trademark" means any trademark, trade name, service mark, or other identifying symbol or name.

(12) The term "motor fuel" means gasoline and diesel fuel of a type distributed for use as a fuel in self-propelled vehicles designed primarily for use on public streets, roads, and highways.

(13) The term "failure" does not include—

(A) any failure which is only technical or unimportant to the franchise relationship;

(B) any failure for a cause beyond the reasonable control of the franchisee; or

(C) any failure based on a provision of the franchise which is illegal or unenforceable under the law of any State (or subdivision thereof).

(14) The terms "fail to renew" and "nonrenewal" mean, with respect to any franchise relationship, a failure to reinstate, continue, or extend the franchise relationship—

(A) at the conclusion of the term, or on the expiration date, stated in the relevant franchise;

(B) at any time, in the case of the relevant franchise which does not state a term of duration or an expiration date; or

(C) following a termination (on or after June 19, 1978) of the relevant franchise which was entered into prior to June 19, 1978, and has not been renewed after such date.

(15) The term "affiliate" means any person who (other than by means of a franchise) controls, is controlled by, or is under common control with, any other person.

(16) The term "relevant geographic market area" includes a State or a standard metropolitan statistical area as periodically established by the Office of Management and Budget.

(17) The term "termination" includes cancellation.

(18) The term "commerce" means any trade, traffic, transportation, exchange, or other commerce—

(A) between any State and any place outside of such State; or

(B) which affects any trade, transportation, exchange, or other commerce described in subparagraph (A).

(19) The term "State" means any State of the United States, the District of Columbia, the Commonwealth of

Puerto Rico, the Virgin Islands, American Samoa, Guam, and any other commonwealth, territory, or possession of the United States.

§ 2802. Franchise relationship

(a) General prohibition against termination or nonrenewal

Except as provided in subsection (b) of this section and section 2803 of this title, no franchisor engaged in the sale, consignment, or distribution of motor fuel in commerce may—

(1) terminate any franchise (entered into or renewed on or after June 19, 1978) prior to the conclusion of the term, or the expiration date, stated in the franchise; or

(2) fail to renew any franchise relationship (without regard to the date on which the relevant franchise was entered into or renewed).

(b) Precondition and grounds for termination or nonrenewal

(1) Any franchisor may terminate any franchise (entered into or renewed on or after June 19, 1978) or may fail to renew any franchise relationship, if—

(A) the notification requirements of section 2804 of this title are met; and

(B) such termination is based upon a ground described in paragraph (2) or such nonrenewal is based upon a ground described in paragraph (2) or (3).

(2) For purposes of this subsection, the following are grounds for termination of a franchise or nonrenewal of a franchise relationship:

(A) A failure by the franchisee to comply with any provision of the franchise, which provision is both reasonable and of material significance to the franchise

relationship, if the franchisor first acquired actual or constructive knowledge of such failure—

(i) not more than 120 days prior to the date on which notification of termination or nonrenewal is given, if notification is given pursuant to section 2804(a) of this title; or

(ii) not more than 60 days prior to the date on which notification of termination or nonrenewal is given, if less than 90 days notification is given pursuant to section 2804(b)(1) of this title.

(B) A failure by the franchisee to exert good faith efforts to carry out the provisions of the franchise, if—

(i) the franchisee was apprised by the franchisor in writing of such failure and was afforded a reasonable opportunity to exert good faith efforts to carry out such provisions; and

(ii) such failure thereafter continued within the period which began not more than 180 days before the date notification of termination or nonrenewal was given pursuant to section 2804 of this title.

(C) The occurrence of an event which is relevant to the franchise relationship and as a result of which termination of the franchise or nonrenewal of the franchise relationship is reasonable, if such event occurs during the period the franchise is in effect and the franchisor first acquired actual or constructive knowledge of such occurrence—

(i) not more than 120 days prior to the date on which notification of termination or nonrenewal is given, if notification is given pursuant to section 2804(a) of this title; or

(ii) not more than 60 days prior to the date on which notification of termination or nonrenewal is

given, if less than 90 days notification is given pursuant to section 2804(b)(1) of this title.

(D) An agreement, in writing, between the franchisor and the franchisee to terminate the franchise or not to renew the franchise relationship, if—

(i) such agreement is entered into not more than 180 days prior to the date of such termination or, in the case of nonrenewal, not more than 180 days prior to the conclusion of the term, or the expiration date, stated in the franchise;

(ii) the franchisee is promptly provided with a copy of such agreement, together with the summary statement described in section 2804(d) of this title; and

(iii) within 7 days after the date on which the franchisee is provided a copy of such agreement, the franchisee has not posted by certified mail a written notice to the franchisor repudiating such agreement.

(E) In the case of any franchise entered into prior to June 19, 1978, and in the case of any franchise entered into or renewed on or after such date (the term of which is 3 years or longer, or with respect to which the franchisee was offered a term of 3 years or longer), a determination made by the franchisor in good faith and in the normal course of business to withdraw from the marketing of motor fuel through retail outlets in the relevant geographic market area in which the marketing premises are located, if—

(i) such determination—

(I) was made after the date such franchise was entered into or renewed, and

(II) was based upon the occurrence of changes in relevant facts and circumstances after such date;

(ii) the termination or nonrenewal is not for the purpose of converting the premises, which are the subject of the franchise, to operation by employees or agents of the franchisor for such franchisor's own account; and

(iii) in the case of leased marketing premises—

(I) the franchisor, during the 180-day period after notification was given pursuant to section 2804 of this title, either made a bona fide offer to sell, transfer, or assign to the franchisee such franchisor's interests in such premises, or, if applicable, offered the franchisee a right of first refusal of at least 45 days duration of an offer, made by another, to purchase such franchisor's interest in such premises; or

(II) in the case of the sale, transfer, or assignment to another person of the franchisor's interest in such premises in connection with the sale, transfer, or assignment to such other person of the franchisor's interest in one or more other marketing premises, if such other person offers, in good faith, a franchise to the franchisee on terms and conditions which are not discriminatory to the franchisee as compared to franchises then currently being offered by such other person or franchises then in effect and with respect to which such other person is the franchisor.

(3) For purposes of this subsection, the following are grounds for nonrenewal of a franchise relationship:

(A) The failure of the franchisor and the franchisee to agree to changes or additions to the provisions of the franchise, if—

(i) such changes or additions are the result of determinations made by the franchisor in good faith and in the normal course of business; and

(ii) such failure is not the result of the franchisor's insistence upon such changes or additions for the purpose of converting the leased marketing premises to operation by employees or agents of the franchisor for the benefit of the franchisor or otherwise preventing the renewal of the franchise relationship.

(B) The receipt of numerous bona fide customer complaints by the franchisor concerning the franchisee's operation of the marketing premises, if—

(i) the franchisee was promptly apprised of the existence and nature of such complaints following receipt of such complaints by the franchisor; and

(ii) if such complaints related to the condition of such premises or to the conduct of any employee of such franchisee, the franchisee did not promptly take action to cure or correct the basis of such complaints.

(C) A failure by the franchisee to operate the marketing premises in a clean, safe, and healthful manner, if the franchisee failed to do so on two or more previous occasions and the franchisor notified the franchisee of such failures.

(D) In the case of any franchise entered into prior to June 19, 1978, (the unexpired term of which, on such date, is 3 years or longer) and, in the case of any franchise entered into or renewed on or after such date (the term of which was 3 years or longer, or with respect to which the franchisee was offered a term of 3 years or longer), a determination made by the fran-

chisor in good faith and in the normal course of business, if—

(i) such determination is—

(I) to convert the leased marketing premises to a use other than the sale or distribution of motor fuel,

(II) to materially alter, add to, or replace such premises,

(III) to sell such premises, or

(IV) that renewal of the franchise relationship is likely to be uneconomical to the franchisor despite any reasonable changes or reasonable additions to the provisions of the franchise which may be acceptable to the franchisee;

(ii) with respect to a determination referred to in subclause (II) or (IV), such determination is not made for the purpose of converting the leased marketing premises to operation by employees or agents of the franchisor for such franchisor's own account; and

(iii) in the case of leased marketing premises such franchisor, during the 90-day period after notification was given pursuant to section 2804 of this title, either—

(I) made a bona fide offer to sell, transfer, or assign to the franchisee such franchisor's interests in such premises; or

(II) if applicable, offered the franchisee a right of first refusal of at least 45-days duration of an offer, made by another, to purchase such franchisor's interest in such premises.

(c) Definition

As used in subsection (b)(2)(C) of this section, the term "an event which is relevant to the franchise rela-

tionship and as a result of which termination of the franchise or nonrenewal of the franchise relationship is reasonable" includes events such as—

(1) fraud or criminal misconduct by the franchisee relevant to the operation of the marketing premises;

(2) declaration of bankruptcy or judicial determination of insolvency of the franchisee;

(3) continuing severe physical or mental disability of the franchisee of at least 3 months duration which renders the franchisee unable to provide for the continued proper operation of the marketing premises;

(4) loss of the franchisor's right to grant possession of the leased marketing premises through expiration of an underlying lease, if—

(A) the franchisee was notified in writing, prior to the commencement of the term of the then existing franchise—

(i) of the duration of the underlying lease; and

(ii) of the fact that such underlying lease might expire and not be renewed during the term of such franchise (in the case of termination) or at the end of such term (in the case of nonrenewal);

(B) during the 90-day period after notification was given pursuant to section 2804 of this title, the franchisor offers to assign to the franchisee any option to extend the underlying lease or option to purchase the marketing premises that is held by the franchisor, except that the franchisor may condition the assignment upon receipt by the franchisor of—

(i) an unconditional release executed by both the landowner and the franchisee releasing the franchisor from any and all liability accruing after the date of the assignment for—

(I) financial obligations under the option (or the resulting extended lease or purchase agreement);

(II) environmental contamination to (or originating from) the marketing premises; or

(III) the operation or condition of the marketing premises; and

(ii) an instrument executed by both the landowner and the franchisee that ensures the franchisor and the contractors of the franchisor reasonable access to the marketing premises for the purpose of testing for and remediating any environmental contamination that may be present at the premises; and

(C) in a situation in which the franchisee acquires possession of the leased marketing premises effective immediately after the loss of the right of the franchisor to grant possession (through an assignment pursuant to subparagraph (B) or by obtaining a new lease or purchasing the marketing premises from the landowner), the franchisor (if requested in writing by the franchisee not later than 30 days after notification was given pursuant to section 2804 of this title), during the 90-day period after notification was given pursuant to section 2804 of this title—

(i) made a bona fide offer to sell, transfer, or assign to the franchisee the interest of the franchisor in any improvements or equipment located on the premises; or

(ii) if applicable, offered the franchisee a right of first refusal (for at least 45 days) of an offer, made by another person, to purchase the interest of the franchisor in the improvements and equipment.

(5) condemnation or other taking, in whole or in part, of the marketing premises pursuant to the power of eminent domain;

(6) loss of the franchisor's right to grant the right to use the trademark which is the subject of the franchise, unless such loss was due to trademark abuse, violation of Federal or State law, or other fault or negligence of the franchisor, which such abuse, violation, or other fault or negligence is related to action taken in bad faith by the franchisor;

(7) destruction (other than by the franchisor) of all or a substantial part of the marketing premises;

(8) failure by the franchisee to pay to the franchisor in a timely manner when due all sums to which the franchisor is legally entitled;

(9) failure by the franchisee to operate the marketing premises for—

(A) 7 consecutive days, or

(B) such lesser period which under the facts and circumstances constitutes an unreasonable period of time;

(10) willful adulteration, mislabeling or misbranding of motor fuels or other trademark violations by the franchisee;

(11) knowing failure of the franchisee to comply with Federal, State, or local laws or regulations relevant to the operation of the marketing premises; and

(12) conviction of the franchisee of any felony involving moral turpitude.

(d) Compensation, etc., for franchisee upon condemnation or destruction of marketing premises

In the case of any termination of a franchise (entered into or renewed on or after June 19, 1978), or in the case of any nonrenewal of a franchise relationship (without

regard to the date on which such franchise relationship was entered into or renewed)—

(1) if such termination or nonrenewal is based upon an event described in subsection (c)(5) of this section, the franchisor shall fairly apportion between the franchisor and the franchisee compensation, if any, received by the franchisor based upon any loss of business opportunity or good will; and

(2) if such termination or nonrenewal is based upon an event described in subsection (c)(7) of this section and the leased marketing premises are subsequently rebuilt or replaced by the franchisor and operated under a franchise, the franchisor shall, within a reasonable period of time, grant to the franchisee a right of first refusal of the franchise under which such premises are to be operated.

§ 2803. Trial and interim franchises

(a) Nonapplicability of statutory nonrenewal provisions

The provisions of section 2802 of this title shall not apply to the nonrenewal of any franchise relationship—

(1) under a trial franchise; or

(2) under an interim franchise.

(b) Definitions

For purposes of this section—

(1) The term "trial franchise" means any franchise—

(A) which is entered into on or after June 19, 1978;

(B) the franchisee of which has not previously been a party to a franchise with the franchisor;

(C) the initial term of which is for a period of not more than 1 year; and

(D) which is in writing and states clearly and conspicuously—

(i) that the franchise is a trial franchise;

(ii) the duration of the initial term of the franchise;

(iii) that the franchisor may fail to renew the franchise relationship at the conclusion of the initial term stated in the franchise by notifying the franchisee, in accordance with the provisions of section 2804 of this title, of the franchisor's intention not to renew the franchise relationship; and

(iv) that the provisions of section 2802 of this title, limiting the right of a franchisor to fail to renew a franchise relationship, are not applicable to such trial franchise.

(2) The term "trial franchise" does not include any unexpired period of any term of any franchise (other than a trial franchise, as defined by paragraph (1)) which was transferred or assigned by a franchisee to the extent authorized by the provisions of the franchise or any applicable provision of State law which permits such transfer or assignment, without regard to any provision of the franchise.

(3) The term "interim franchise" means any franchise—

(A) which is entered into on or after June 19, 1978;

(B) the term of which, when combined with the terms of all prior interim franchises between the franchisor and the franchisee, does not exceed 3 years;

(C) the effective date of which occurs immediately after the expiration of a prior franchise, ap-

plicable to the marketing premises, which was not renewed if such nonrenewal—

(i) was based upon a determination described in section 2802(b)(2)(E) of this title, and

(ii) the requirements of section 2802(b)(2)(E) of this title were satisfied; and

(D) which is in writing and states clearly and conspicuously—

(i) that the franchise is an interim franchise;

(ii) the duration of the franchise; and

(iii) that the franchisor may fail to renew the franchise at the conclusion of the term stated in the franchise based upon a determination made by the franchisor in good faith and in the normal course of business to withdraw from the marketing of motor fuel through retail outlets in the relevant geographic market area in which the marketing premises are located if the requirements of section 2802(b)(2)(E)(ii) and (iii) of this title are satisfied.

(c) Nonrenewal upon meeting statutory notification requirements

If the notification requirements of section 2804 of this title are met, any franchisor may fail to renew any franchise relationship—

(1) under any trial franchise, at the conclusion of the initial term of such trial franchise; and

(2) under any interim franchise, at the conclusion of the term of such interim franchise, if—

(A) such nonrenewal is based upon a determination described in section 2802(b)(2)(E) of this title; and

(B) the requirements of section 2802(b)(2)(E)(ii) and (iii) of this title are satisfied.

§ 2804. Notification of termination or nonrenewal of franchise relationship

(a) General requirements applicable to franchisor

Prior to termination of any franchise or nonrenewal of any franchise relationship, the franchisor shall furnish notification of such termination or such nonrenewal to the franchisee who is a party to such franchise or such franchise relationship—

(1) in the manner described in subsection (c) of this section; and

(2) except as provided in subsection (b) of this section, not less than 90 days prior to the date on which such termination or nonrenewal takes effect.

(b) Additional requirements applicable to franchisor

(1) In circumstances in which it would not be reasonable for the franchisor to furnish notification, not less than 90 days prior to the date on which termination or nonrenewal takes effect, as required by subsection (a)(2) of this section—

(A) such franchisor shall furnish notification to the franchisee affected thereby on the earliest date on which furnishing of such notification is reasonably practicable; and

(B) in the case of leased marketing premises, such franchisor—

(i) may not establish a new franchise relationship with respect to such premises before the expiration of the 30-day period which begins—

(I) on the date notification was posted or personally delivered, or

(II) if later, on the date on which such termination or nonrenewal takes effect; and

(ii) may, if permitted to do so by the franchise agreement, repossess such premises and, in circumstances under which it would be reasonable to do so, operate such premises through employees or agents.

(2) In the case of any termination of any franchise or any nonrenewal of any franchise relationship pursuant to the provisions of section 2802(b)(2)(E) of this title or section 2803(c)(2) of this title, the franchisor shall—

(A) furnish notification to the franchisee not less than 180 days prior to the date on which such termination or nonrenewal takes effect; and

(B) promptly provide a copy of such notification, together with a plan describing the schedule and conditions under which the franchisor will withdraw from the marketing of motor fuel through retail outlets in the relevant geographic area, to the Governor of each State which contains a portion of such area.

(c) Manner and form of notification

Notification under this section—

(1) shall be in writing;

(2) shall be posted by certified mail or personally delivered to the franchisee; and

(3) shall contain—

(A) a statement of intention to terminate the franchise or not to renew the franchise relationship, together with the reasons therefor;

(B) the date on which such termination or nonrenewal takes effect; and

(C) the summary statement prepared under subsection (d) of this section.

(d) Preparation, publication, etc., of statutory summaries

(1) Not later than 30 days after June 19, 1978, the Secretary of Energy shall prepare and publish in the Federal Register a simple and concise summary of the provisions of this subchapter, including a statement of the respective responsibilities of, and the remedies and relief available to, any franchisor and franchisee under this subchapter.

(2) In the case of summaries required to be furnished under the provisions of section 2802(b)(2)(D) of this title or subsection (c)(3)(C) of this section before the date of publication of such summary in the Federal Register, such summary may be furnished not later than 5 days after it is so published rather than at the time required under such provisions.

§ 2805. Enforcement provisions

(a) Maintenance of civil action by franchisee against franchisor; jurisdiction and venue; time for commencement of action

If a franchisor fails to comply with the requirements of section 2802 or 2803 of this title, the franchisee may maintain a civil action against such franchisor. Such action may be brought, without regard to the amount in controversy, in the district court of the United States in any judicial district in which the principal place of business of such franchisor is located or in which such franchisee is doing business, except that no such action may be maintained unless commenced within 1 year after the later of—

(1) the date of termination of the franchise or nonrenewal of the franchise relationship; or

(2) the date the franchisor fails to comply with the requirements of section 2802 or 2803 of this title.

(b) Equitable relief by court; bond requirements; grounds for nonexercise of court's equitable powers

(1) In any action under subsection (a) of this section, the court shall grant such equitable relief as the court determines is necessary to remedy the effects of any failure to comply with the requirements of section 2802 or 2803 of this title, including declaratory judgment, mandatory or prohibitive injunctive relief, and interim equitable relief.

(2) Except as provided in paragraph (3), in any action under subsection (a) of this section, the court shall grant a preliminary injunction if—

(A) the franchisee shows—

(i) the franchise of which he is a party has been terminated or the franchise relationship of which he is a party has not been renewed, and

(ii) there exist sufficiently serious questions going to the merits to make such questions a fair ground for litigation; and

(B) the court determines that, on balance, the hardships imposed upon the franchisor by the issuance of such preliminary injunctive relief will be less than the hardship which would be imposed upon such franchisee if such preliminary injunctive relief were not granted.

(3) Nothing in this subsection prevents any court from requiring the franchisee in any action under subsection (a) of this section to post a bond, in an amount established by the court, prior to the issuance or continuation of any equitable relief.

(4) In any action under subsection (a) of this section, the court need not exercise its equity powers to compel

continuation or renewal of the franchise relationship if such action was commenced—

(A) more than 90 days after the date on which notification pursuant to section 2804(a) of this title was posted or personally delivered to the franchisee;

(B) more than 180 days after the date on which notification pursuant to section 2804(b)(2) of this title was posted or personally delivered to the franchisee; or

(C) more than 30 days after the date on which the termination of such franchise or the nonrenewal of such franchise relationship takes effect if less than 90 days notification was provided pursuant to section 2804(b)(1) of this title.

(c) Burden of proof; burden of going forward with evidence

In any action under subsection (a) of this section, the franchisee shall have the burden of proving the termination of the franchise or the nonrenewal of the franchise relationship. The franchisor shall bear the burden of going forward with evidence to establish as an affirmative defense that such termination or nonrenewal was permitted under section 2802(b) or 2803 of this title, and, if applicable, that such franchisor complied with the requirements of section 2802(d) of this title.

(d) Actual and exemplary damages and attorney and expert witness fees to franchisee; determination by court of right to exemplary damages and amount; attorney and expert witness fees to franchisor for frivolous actions

(1) If the franchisee prevails in any action under subsection (a) of this section, such franchisee shall be entitled—

(A) consistent with the Federal Rules of Civil Procedure, to actual damages;

(B) in the case of any such action which is based upon conduct of the franchisor which was in willful disregard of the requirements of section 2802 or 2803 of this title, or the rights of the franchisee thereunder, to exemplary damages, where appropriate; and

(C) to reasonable attorney and expert witness fees to be paid by the franchisor, unless the court determines that only nominal damages are to be awarded to such franchisee, in which case the court, in its discretion, need not direct that such fees be paid by the franchisor.

(2) The question of whether to award exemplary damages and the amount of any such award shall be determined by the court and not by a jury.

(3) In any action under subsection (a) of this section, the court may, in its discretion, direct that reasonable attorney and expert witness fees be paid by the franchisee if the court finds that such action is frivolous.

(e) Discretionary power of court to compel continuation or renewal of franchise relationship; grounds for noncompulsion; right of franchisee to actual damages and attorney and expert witness fees unaffected

(1) In any action under subsection (a) of this section with respect to a failure of a franchisor to renew a franchise relationship in compliance with the requirements of section 2802 of this title, the court may not compel a continuation or renewal of the franchise relationship if the franchisor demonstrates to the satisfaction of the court that—

(A) the basis for such nonrenewal is a determination made by the franchisor in good faith and in the normal course of business—

(i) to convert the leased marketing premises to a use other than the sale or distribution of motor fuel,

(ii) to materially alter, add to, or replace such premises,

(iii) to sell such premises,

(iv) to withdraw from the marketing of motor fuel through retail outlets in the relevant geographic market area in which the marketing premises are located, or

(v) that renewal of the franchise relationship is likely to be uneconomical to the franchisor despite any reasonable changes or reasonable additions to the provisions of the franchise which may be acceptable to the franchisee; and

(B) the requirements of section 2804 of this title have been complied with.

(2) The provisions of paragraph (1) shall not affect any right of any franchisee to recover actual damages and reasonable attorney and expert witness fees under subsection (d) of this section if such nonrenewal is prohibited by section 2802 of this title.

(f) Release or waiver of rights

(1) No franchisor shall require, as a condition of entering into or renewing the franchise relationship, a franchisee to release or waive—

(A) any right that the franchisee has under this subchapter or other Federal law; or

(B) any right that the franchisee may have under any valid and applicable State law.

(2) No provision of any franchise shall be valid or enforceable if the provision specifies that the interpretation or enforcement of the franchise shall be governed by the law of any State other than the State in which the fran-

chisee has the principal place of business of the franchisee.

§ 2806. Relationship of statutory provisions to State and local laws

(a) Termination or nonrenewal of franchise

(1) To the extent that any provision of this subchapter applies to the termination (or the furnishing of notification with respect thereto) of any franchise, or to the nonrenewal (or the furnishing of notification with respect thereto) of any franchise relationship, no State or any political subdivision thereof may adopt, enforce, or continue in effect any provision of any law or regulation (including any remedy or penalty applicable to any violation thereof) with respect to termination (or the furnishing of notification with respect thereto) of any such franchise or to the nonrenewal (or the furnishing of notification with respect thereto) of any such franchise relationship unless such provision of such law or regulation is the same as the applicable provision of this subchapter.

(2) No State or political subdivision of a State may adopt, enforce, or continue in effect any provision of law (including a regulation) that requires a payment for the goodwill of a franchisee on the termination of a franchise or nonrenewal of a franchise relationship authorized by this subchapter.

(b) Transfer or assignment of franchise

(1) Nothing in this subchapter authorizes any transfer or assignment of any franchise or prohibits any transfer or assignment of any franchise as authorized by the provisions of such franchise or by any applicable provision of State law which permits such transfer or assignment without regard to any provision of the franchise.

(2) Nothing in this subchapter shall prohibit any State from specifying the terms and conditions under

which any franchise or franchise relationship may be transferred to the designated successor of a franchisee upon the death of the franchisee.

(3)

No. 08-372

Supreme Court, U.S.
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In The

Supreme Court of the United States

SHELL OIL PRODUCTS COMPANY LLC;
MOTIVA ENTERPRISES LLC;
SHELL OIL COMPANY, INC.,

Petitioners,

v.

MAC'S SHELL SERVICE, INC.; CYNTHIA KAROL;
JOHN A. SULLIVAN; AKMAL, INC.; SID PRASHAD;
RAM CORPORATION, INC.; J&M AVRAMIDIS, INC.;
STEPHEN PISARCZYK,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The First Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether Petitioners have presented compelling reasons to grant the Petition where the decision of the First Circuit to affirm respondents' constructive termination claim under the Petroleum Marketing Practices Act, 15 U.S.C. §§ 2801-2806, is not contrary to the decisions of other courts of appeals.

CORPORATE DISCLOSURE STATEMENT

Respondents MAC's Shell Service, Inc. ("MAC"), Akmal, Inc. ("Akmal"), RAM Corporation, Inc. ("RAM"), or J&M Avramidis, Inc. ("J&M") have no parent corporation, nor are there any publicly traded companies that owns more than ten percent of the stock of MAC, Akmal, RAM or J&M.

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MISCELLANEOUS

S.Rep. No. 731, 95th Cong., 2d Sess. 18

INTRODUCTION

The crux of the Petition proffered by Shell and Motiva is that the courts of appeals are fundamentally divided with respect to the availability of a constructive termination claim under the Petroleum Marketing Practices Act, 15 U.S.C. §§ 2801-2806 ("PMPA" or the "Act"). In petitioners' view, in contrast to the positions of the First and Fourth Circuits, the Ninth and Sixth Circuits require actual severance of the franchise relationship for a constructive termination claim. The alleged circuit split is perceived, not real. The Sixth Circuit – like the First Circuit – recognizes constructive termination claims under the PMPA where (following an assignment of the franchise), one of the three statutory components of the franchise (the contract to use the refiner's trademark, the contract for the supply of motor fuel, and the lease of the premises) is breached or where the assignment is in violation of state law. Indeed, the First Circuit has adopted the Sixth Circuit's test for constructive terminations. The different outcomes between the circuit cases have nothing to do with differences in the elements of a constructive termination claim or the need for a complete severance of the franchise relationship. The outcomes were based on evidence (or the lack thereof) of a breach of one of the statutory components of the franchise. Nothing in the holdings of the Sixth Circuit cases mandates actual severance of the franchise relationship for constructive termination.

Nor do the decisions of the First and Fourth Circuits somehow disturb the goal of uniform standards for terminations under the Act or federalize mere breach of contract claims. It is evident from the structure, language and purpose of the Act that the goal of uniformity in standards for terminations is not meant to be inflexible. Certainly, as the cases confirm, the Act recognizes that assignments which increase the risks and burdens of the dealers' duties and obligations in violation of state law are violative of the Act and result in the termination of the franchise. This demonstrates not only that Congress did not intend to foster a single, uniform and inflexible standard in construing terminations under the Act, but also puts the lie to petitioners' contention that actual severance is required for constructive termination. Obviously, material changes in the risks and burdens imposed on a franchisee as a result of an assignment do not require abandonment to be unlawful under state law or violative of the Act, as the First Circuit recognized. Moreover, the First Circuit's decision makes it abundantly clear that the standard for constructive termination of a franchise is not lightly met and requires the effective termination of one of the agreements comprising the franchise. In this case the evidence established that as part of a strategy to force the conversion of franchisee-operated stations to stations run by Shell's joint venture, respondents' leases with Shell, which for two decades provided for rent subsidies, were effectively terminated when, after they were assigned to Motiva, the rent subsidies were eliminated, causing material

changes in the manner in which the Respondents operated their businesses and sold gasoline. Recognizing the intent of the Act to protect the expectations of dealers in their investments made as franchisees, the First Circuit found that the case presented a strong argument for the doctrine of constructive termination.

STATEMENT OF THE CASE

A. Factual Background

From the petitioners' description of the case and recitation of facts, one is hard pressed to recognize the actual case detailed at length in the First Circuit's decision. Understandably, the petitioners are silent on the substantial evidence presented, that for nearly two decades, commencing in 1982 and continuing until shortly after petitioner Motiva was formed by Shell and others, the respondents' leases with Shell included a permanent rent subsidy to offset their monthly rents. The evidence was, as the First Circuit noted, that "[v]arious representations were made to the Dealers to the effect that the Subsidy or something like it would always exist, the contract rent was to be disregarded, and the cancellation provision was only intended to be invoked in a situation like war or an oil embargo." Pet.App. at 3a. *See*

also Pet.App. at 14a.[1] Moreover, "internal Shell documentation indicat[ed] that the Subsidy was intended to be permanent, that franchisees should plan their business around the continued availability of the Subsidy, and that franchisees would understand the loss of the Subsidy to be a breach of a promise made by Shell." Pet.App. at 15a.

The petitioners also conspicuously avoid the evidence that with the creation of Motiva they embarked on a plan to transform Shell's existing gasoline distribution network to company-operated facilities which would allow them to capture profits then being earned by the independent dealers. The plan to convert the network was part of the "Strategic Marketing Initiative" ("SMI"). Initial plans called for the conversion of hundreds of independent stations to company-operated stations at a cost of several hundred million dollars. Motiva's goal for Massachusetts was to increase the number of company-operated stations and decrease the number of independent stations in certain markets by more than 70%. If forced to purchase the goodwill in each franchisees' business, however, the petitioners anticipated having to pay each dealer $200,000 or more per station. By early 2000, they had targeted the stations to be

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[1] "There was evidence that the defendants said that the Subsidy was intended to be permanent, that the 30-day notice provision was only in place for cases of war or embargo, and that the Dealers could rely on the continuation of the Subsidy or something like it." Pet.App. at 14a.

converted, including the stations operated by the respondents and remaining plaintiffs.

Beyond the substantial costs involved to buy out the targeted dealers, another major impediment to the conversion of the dealerships was the restrictions imposed by the PMPA, which limited Motiva's right to terminate the franchises. For petitioners, converting dealers to company-operated stations would be beneficial because company-operated stations would not be subject to PMPA restrictions. Petitioners' documents acknowledged the need to devise "methods to overcome these restrictions."

Ultimately, petitioners instituted a plan to squeeze the dealers out of business, thus appropriating stations without incurring the huge cost of buyouts and effectively avoiding the limitations imposed by the PMPA. To this end, the subsidy was eliminated, which the petitioners understood would cause dramatic increases in rent and result in the closure of some franchisee-operated stations. In addition, new Motiva leases were drafted to replace expiring Shell leases. These leases were presented to the dealers on a "take-it-or-leave-it" basis. The respondents were told that if they refused to sign the new Motiva leases, their franchises would be terminated. While the Motiva leases differed in several ways from the Shell leases, the most significant change was the manner in which rent was calculated, the net effect of which was that rents increased even further. The evidence showed that the petitioners knew that the new leases would cause a decrease in the number of

independent dealers. With the implementation of the SMI, the number of independent stations in Massachusetts decreased from 177 (in January 1998) to 96 (in January 2003); during the same time period, the number of company-operated stations increased from 3 to 40.

B. First Circuit Decision

These are the factual predicates which presented, the First Circuit noted, "a strong argument for the doctrine of constructive termination." Pet.App. at 19a. There is no indication in the First Circuit's decision that the court perceived a split in the circuits on the issue of constructive termination or indeed, more remarkably, that the court felt it was, by its decision, somehow creating a fundamental rift with the Sixth and Ninth Circuits on the elements of such claims, as the petitioners contend. In fact, the First Circuit notes that in its prior case of *Chestnut Hill Gulf v. Cumberland Farms Inc.*, 940 F.2d 744 (1st Cir. 1991) it had adopted the test for constructive termination established by the Sixth Circuit.

> [T]o sustain a claim, under the PMPA, that a franchisor assigned and thereby constructively terminated a franchise agreement, the franchisee must prove either: (1) that by making the assignment, the franchisor breached one of the three statutory components of the franchise agreement, (the contract to use the refiner's trademark, the contract for the supply of motor fuel, or the

> lease of the premises), and thus, violated the PMPA; or (2) that the franchisor made the assignment in violation of state law and thus, the PMPA was invoked.

Pet.App. at 16a *citing Chestnut Hill Gulf*, 940 F.2d at 750-51 (*quoting May-Som Gulf, Inc. v. Chevron U.S.A., Inc.*, 869 F.2d 917, 922 (6th Cir. 1989)). It is also noteworthy that the above quote from *May-Som Gulf* cites for support, among other cases, the Fourth Circuit's decision in *Barnes v. Gulf Oil Corp.*, 795 F.2d 358 (4th Cir. 1986), which figures prominently in many cases and, according to the petitioners, is at odds with the Sixth Circuit's view.[2] Again, there is no indication that the Sixth Circuit in *May-Som Gulf*

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[2] In *Barnes*, the franchisee (Barnes) alleged that her franchise was constructively terminated when the franchisor (Gulf) assigned its interest in the franchise to Anderson Oil. *Barnes*, 795 F.2d at 360. As a result of the assignment, Barnes claimed that she was compelled to pay more money for gasoline (as much as $1,000 per month) which forced her to raise her prices and decreased her sales and net income. *Id.* at 361. The trial court held that the assignment did not terminate the franchise because Barnes was still in business. *Id.* at 360. The "primary issue" addressed on appeal was whether an assignment of a franchise that increased the retailer's cost of gasoline over a stipulated price gave rise to a claim for constructive termination under the PMPA. *Id.* at 359. The Fourth Circuit answered in the affirmative and reversed the grant of summary judgment stating that "[a] franchisor cannot circumvent the protections the [PMPA] affords a franchisee by the simple expedient of assigning the franchisor's obligation to an assignee *who increases the franchisee's burden* by charging more for gasoline than the stipulated franchise price." *Id.* at 362 (emphasis added).

considered *Barnes* an abnormality on this issue, and the First Circuit noted in this case that what set *Barnes* apart from *May-Som Gulf* and *Chestnut Hill Gulf* was that *Barnes* concerned an actual breach of one of the statutory elements of the franchise. Pet.App. at 16a. In other words, the difference in the cases was not in the articulation of the elements of a constructive termination claim, but whether the plaintiffs had sufficient facts to make out a claim that one of the statutory elements of the franchise had been breached. *See May-Som Gulf*, 869 F.2d at 923 ("Thus, on the facts presented here, we conclude that plaintiffs cannot secure relief on the ground that Chevron or Cumberland breached one of the three components of their Gulf franchise agreements.").

In any event, as to the substantive constructive termination claim (i.e. breach of one of the three statutory components of the franchise), the First Circuit ruled that Shell was not insulated from liability by virtue of its assignment to Motiva. An action for constructive termination lies against the assignor of a franchise when the assignee breaches the franchise. Pet.App. at 17a. The PMPA did not relegate the franchisee to seeking damages against the assignee which might not have the resources to satisfy a judgment. *Ibid.* The First Circuit also rejected petitioners' contention that the breach had to be contemporaneous with the assignment. A delay between the assignment and the breach was not relevant and this was especially true where, as here, the assignee is a joint venture in which the franchisor

is a party. *Ibid. See also Fresher v. Shell Oil Co.*, 846 F.2d 45, 46-47 (9th Cir. 1988); *Riverdale Enters., Inc. v. Shell Oil Co.*, 41 F. Supp. 2d 56, 64 (D. Mass. 1999).

Further, the court ruled that the breach of the statutory element of the franchise did not have to be a total breach. Pet.App. at 18a. The court rejected the petitioners' analogy to constructive termination in employment law or constructive eviction. Unlike those doctrines, which require actual severance of the relationship, constructive termination of the franchise did not require the actual abandonment of years of work and investment and the severance of the franchise relationship. *Ibid.* The court noted, however, that constructive termination could only be found where the breach of the lease, as the district court charged, was such a material change that it effectively ended the lease. *Ibid.*

To require an actual abandonment of years of work and investment before a right under the PMPA is recognized was unreasonable and would frustrate the congressional plan by requiring a franchisee to go out of business before invoking the protections of the PMPA. *Ibid.* Thus, "[w]here the franchisor has breached its obligations to the franchisee such that the franchisee faces the effective end of the franchise, the PMPA must treat that as a termination of the franchise." Pet.App. at 20a-21a. The underlying reason, as the court goes on to explain, is the Act's protection of the franchisee's expectations, which can be undermined or eviscerated when, as here, the franchisor had engaged in a plan to squeeze out the

franchisees and convert their stations to direct operation. Pet.App. at 19a-20a. Without the Act's express restriction on the franchisor's ability to convert dealer franchises to its own use, "the franchisor could extract any increase in value by the franchisee's investment without sharing that increase with the franchisee. This would dampen the incentive for a franchisee to develop the business." Pet.App. at 20a. The court noted that nothing prevented the petitioners from buying the dealers out. "What the PMPA does forbid is franchisors using their power to dictate impossible franchise terms in order to force the franchisees to walk away from their investments or to set them at artificially low prices. This is exactly what the Dealers claimed was happening here." Pet.App. at 20a n. 13. Finally, the court concluded that there was ample evidence for the jury to conclude that the financial hardship resulting from the loss of the subsidy meant the end of the relationship with Shell and that it would not step into the jury box to provide a second opinion. As the verdict was not against the weight of the evidence and did not result in a blatant miscarriage of justice, the district court did not abuse its discretion in its denial of the motion for a new trial. *Id.* at 21a.

REASONS FOR DENYING THE PETITION

A. The Circuit Court Decisions Uniformly Recognize A Claim For Constructive Termination Where There Has Been A Breach Of The Franchise

Contrary to petitioners' contention, the courts of appeals are not fundamentally divided with respect to the availability of a constructive termination claim under the PMPA. Petitioners argue that the Sixth and Ninth Circuits require actual severance of the franchise relationship for a constructive termination claim.[3] Petition at 17 *citing Portland 76 Auto/Truck Plaza, Inc. v. Union Oil Co. of California*, 153 F.3d 938 (9th Cir. 1998); *Little Oil Co. v. Atl. Richfield Co.*, 852 F.2d 441 (9th Cir. 1988); *Clark v. BP Oil Co.*, 137 F.3d 386 (6th Cir. 1998).[4] Such is not the case. As

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[3] Petitioners failed to raise this argument in the district court. By failing to object to the district court's charge that constructive termination was available where there was a material change that effectively ended the lease, even though the plaintiffs continued to operate the business, they waived the argument that constructive termination requires severance of the franchise relationship.

[4] The Petitioners assert that the Fifth and Eleventh Circuits have signaled their agreement with the Sixth and Ninth Circuits. Petition at 18 *citing McGinnis v. Star Enterprise*, No. 93-1234, 1993 WL 455587 (5th Cir. Oct. 21, 1993); *Abrams Shell v. Shell Oil Co.*, 343 F.3d 482, 486-488 (5th Cir. 2003); *Shukla v. BP Exploration & Oil, Inc.*, 115 F.3d 849 (11th Cir. 1997). Except for *McGinnis*, an unpublished decision, the remaining cases are unexceptional in that they recognize that a claim for constructive termination requires a breach of one of the statutory components of the franchise. In *McGinnis*, the

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noted, the Sixth Circuit like the First Circuit (and in fact the other circuits that have decided the issue) recognizes that a claim for constructive termination under the PMPA is available where, as here, following an assignment of the franchise, one of the three statutory components of the franchise (the contract to use the refiner's trademark, the contract for the supply of motor fuel, or the lease of the premises) is breached and/or where the assignment is in violation of state law. *See Chestnut Hill Gulf v. Cumberland Farms Inc.*, 940 F.2d 744 (1st Cir. 1991); *May-Som Gulf, Inc. v. Chevron U.S.A., Inc.*, 869 F.2d 917, 922 (6th Cir. 1989); *see also Abrams Shell v. Shell Oil Co.*, 343 F.3d 482, 486-488 (5th Cir. 2003); *Shukla v. BP Exploration & Oil, Inc.*, 115 F.3d 849, 852-853 (11th Cir. 1997); *Beachler v. Amoco Oil Co.*, 112 F.3d 902, 906-07 (7th Cir. 1997). Petitioners fail to acknowledge that the First Circuit in *Chestnut Hill Gulf* adopted the test for constructive termination articulated by the Sixth Circuit in *May-Som Gulf* and deftly attempt to relegate *May-Som Gulf* to a footnote, standing for the proposition that constructive termination claims have been allowed where a franchisor assigns a franchise in violation of state law, which petitioners argue is not a theory at issue in this case. Petition at

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entire discussion of the PMPA claim is contained in two short paragraphs, with the court pronouncing without analysis that "[t]he plain meaning of the statute does not provide for 'constructive termination.'" This pronouncement is at odds with the recognition in *Abrams Shell, supra,* that the Act provides for constructive termination.

16 n. 9. This myopic view ignores the fact that under the Act "franchise" is defined to include the unexpired portion of any franchise that is transferred or assigned as authorized by the provisions of such franchise or by any applicable provision of state law which permits such transfer or assignment without regard to any provision of the franchise. § 2801(1)(B). As the Fourth Circuit noted in *Barnes*, an assignment that is unauthorized by state law is prohibited under the Act and the unexpired portion of the franchise is no longer a franchise as defined by the Act. 795 F.2d at 363. It follows that "[a]n assignment that is invalid under state law because it increases the franchisee's burdens is tantamount to a constructive termination of the franchise." *Ibid.* Nothing in *May-Som Gulf* takes issue with the Fourth Circuit's analysis in *Barnes*, and the First Circuit's analysis in this case makes clear that Motiva's termination of the rent subsidies effectively increased the dealers' burdens under the Shell leases and effectively terminated those leases.

Petitioners' reliance on *Clark* does not advance their argument. *Clark*, which relies on and extensively cites *May-Som Gulf*, does not stand for the proposition that severance is required for a constructive termination. The *Clark* court made clear that

> In *May-Som*, this court interpreted the minimum standards provided by the PMPA to permit a claim of constructive termination of a franchise resulting from an assignment only where there is a breach of one of the

> statutory components of the franchise – the contract to use the refiner's trademark, the contract for the supply of motor fuel, and the lease of the premises – or when the assignment violates applicable state law.

137 F.3d at 392. The problem for Clark was that the franchise supply agreement provided for an open price term which could be freely changed by BP. *Ibid.* In other words, the assignee did nothing to Clark that BP could not have done. *Ibid.* This was in contrast to the situation in *Barnes*, as the *Clark* court noted, where the dealer did not agree to an open price term and was allowed to reach the jury on whether the increased price paid for gasoline materially increased his burden under the agreements. *Id.* at 393. Moreover, in *Clark*, unlike here, the price supports and other arrangements with BP were determined to be informal arrangements not required and enforceable under the franchise. *Id.* at 394. Thus, even though the court in *Clark* recognized that a material change in the franchise gives rise to a violation under the Act, *id.* at 393 discussing *Barnes*, *supra*, because the price supports were gratuitous, Clark could not establish a material change in the BP franchise. *Id.* at 393-394.

The Ninth Circuit cases do not support the petitioners as the Ninth Circuit has not yet decided whether a constructive termination claim is viable under the PMPA. *Portland 76*, 153 F.3d at 948 ("We assume for purposes of discussion, but do no decide, that constructive termination may give rise to a claim

under the Act."); *DuFresne's Auto Service, Inc. v. Shell Oil Co.*, 992 F.2d 920 (9th Cir. 1993). However, in *Little Oil Co., Inc. v. Atlantic Richfield Co.*, 852 F.2d 441 (9th Cir. 1988), the court, while acknowledging that it had not yet decided whether the PMPA applied to constructive terminations, approved of the district court's instructions that the plaintiff had to prove that the franchisor's changes were "unduly burdensome and overbearing." 852 F.2d at 445. "If the changes were not 'unduly burdensome and overbearing,' no 'constructive' termination could have occurred." *Ibid.* The court noted that the challenged instruction defined the contour of the plaintiffs' initial burden under the PMPA of proving that a constructive termination has occurred." *Ibid.* In short, there is no suggestion in *Little* that complete severance of the franchise relationship is required.

In sum, the main predicate for the Petition is more the product of creative and selective lawyering than of actual disagreement by the courts of appeals on the reasoning and contours of constructive termination under the Act. As there is no circuit split to address, the Petition should be denied.[5]

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[5] Petitioners cite a number of district court decisions to support the argument that, as with the circuit courts, there are divergent results in the district court decisions. Petition at 22-24. But the misreading of circuit court decisions by district courts certainly is not a compelling reason to grant the Petition where the circuit court decisions themselves have consistently recognized constructive termination under the circumstances in this case. *See May-Som Gulf*, 869 F.2d at 922 n. 3 (distinguishing

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B. The First Circuit Decision Does Not Eviscerate The Standard For Terminations Under The Act Or Federalize Mere Breach Of Contract Claims.

The petitioners argue that the First and Fourth Circuit law expands the Act's coverage and federalizes a large category of disputes formerly governed by state contract law. Like the perceived circuit split on constructive terminations, the supposed policy reasons advanced by the petitioners for accepting the Petition are part creativity and part studied ignorance. The petitioners argue that the standard articulated by the First Circuit was unintelligible and that the court failed to explain how a breach could effectively end a franchise when the plaintiff continued to operate. Petition at 25. The answer is not all that difficult to appreciate. The Act speaks of the termination of a franchise (that is, the termination of one of the agreements included in the franchise, here, Shell's lease agreements) and the nonrenewal of the franchise relationship. Simply stated, the evidence was clear (and the jury so found under the court's instructions) that the subsidy was of such material importance to the dealers that with Motiva's cancellation of the decades-old rent subsidies, the original Shell leases were effectively terminated.[6] Thereafter,

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the district court decision in *Florham Park I*, Bus. Franchise Guide (CCH) ¶9011 because it did not correctly apply *Barnes*).

[6] The failure to appreciate the difference with franchise and franchise relationship is also evident in the petitioners' failure to

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the parties effectively were left going forward with what in reality were Motiva leases sans the rent subsidies. There is nothing incoherent about this so-called standard and it certainly does not allow dealers to allege PMPA violations in virtually any contract dispute. Pet. at 25. To require termination to include the end of the franchise relationship would equate termination with nonrenewal under the Act, notwithstanding the clear differences between the two concepts.

The First Circuit decision also does not disturb the goal of uniform standards for terminations under the Act. The Act recognizes that assignments which increase the risks and burdens of the dealers' duties and obligations in violation of state law are violative of the Act and result in the termination of the franchise. *Barnes*, 795 F.2d at 363. As the *Barnes* court

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distinguish constructive termination under the Act and constructive eviction or constructive discharge. Petition at 19-20. In the first instance, constructive eviction and constructive discharge liability claims are not part and parcel of a Federal statutory scheme enacted in large measure to protect franchisees from overreaching and oppressive tactics by franchisors. Unlike constructive termination of a franchise, where a material breach of one of the statutory agreements making up the franchise is possible without cessation of the franchise relationship, one cannot conceive of a constructive discharge or constructive eviction without a complete break in the employment or landlord relationship. Indeed, it may well be that the terms of the actual agreements have little or nothing to do with the living or employment conditions that form the basis for the construction eviction or discharge claims. The First Circuit was correct in noting that petitioners' analogy failed.

noted, a claim for "constructive termination" is rooted in the legislative history of the Act and the equitable powers vested with the judiciary. *Id.* at 362. The drafters of the legislation recognized that

> there is an area in which Federal termination provisions under this legislation and State-granted rights of assignability of a franchise may conflict. It is intended that the harmonizing of these competing interests be left to judicial balancing of competing equities on a case-by-case basis. No hard and fast statutory rule would accomplish the desired goal of harmonizing the competing statutory objectives as equitably as application of general principles of equity to specific fact situations.
>
> * * *
>
> Therefore, the legislation leaves to the courts the task of resorting to traditional principles of equity to maximize attainment of competing statutory objectives consistently with the supremacy clause of the Constitution and the purpose of the Federal legislation.

Ibid, quoting S.Rep. No. 731, 95th Cong., 2d Sess. at 43.[7]

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[7] As noted, this demonstrates that Congress did not intend to foster an inflexible standard in construing terminations under the Act, and undermines petitioners' contention that actual severance is required for constructive termination. Material changes in the risks and burdens imposed on a franchisee as a result of an assignment do no require abandonment to be

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Thus, the court concluded that assignments authorized by state law may have to give way to the Acts termination provisions. *Id.* at 362. "One of Congress' purposes in adopting the [PMPA] was to protect franchisees from overbearing, burdensome conduct by the franchisor during the term of the franchise." *Id.* at 363.

Moreover, in this case, as the First Circuit recognized, the driving issue struck one of the central tenets of protection that the Act provides to franchisees. The Act prohibits termination and nonrenewal where the purpose of the termination or nonrenewal is to convert the leased premises to operation by employees or agents of the franchisor for the franchisor's own account. Thus, under § 2802(b)(3) an appropriate ground for nonrenewal of the franchise relationship occurs when the franchisor and franchisee fail to agree on terms proposed by the franchisor in good faith and the ordinary course of business so long as the purpose is not to convert stations to the franchisor's control or otherwise to prevent the renewal of the ongoing relationship:

> (A) The failure of the franchisor and franchisee to agree to changes or additions to provisions of the franchise, if –
>
> (i) such changes or additions are the result of determinations made by

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unlawful under state law or violative of the Act, as the First Circuit recognized.

> the franchisor in good faith and in the normal course of business; and
>
> (ii) such failure is not the result of the franchisor's insistence upon such changes or additions for the purpose of converting the leased marketing premises to operation by employees or agents of the franchisor for the benefit of the franchisor or otherwise preventing the renewal of the franchise relationship.

Here the First Circuit recognized:

> At trial the Dealers argued that Shell assigned the franchise agreements to Motiva, even *created* Motiva, in order to squeeze them out of their franchises. If the jury accepted as the reason for the changes that Shell wanted to squeeze them out of their franchises, "the case falls within the scope of the PMPA, which is designed not to freeze the franchise agreements exactly where they were, but to prevent franchisors from improperly terminating franchises and thereby to ensure that franchisees benefit from successful investment in their franchises."

Pet.App. at 19a. The import of this prohibition was understood by the First Circuit, which noted that without the Act's express restriction on the franchisor's ability to convert dealer franchises to its own use, "the franchisor could extract any increase in value by the franchisee's investment without sharing that increase with the franchisee. This would dampen

the incentive for a franchisee to develop the business." Pet.App. at 20a. The court noted that this same protection for franchisee expectations underlies the PMPA's requirement that a franchisor make a bona fide offer or grant a right of first refusal to the franchisee when the franchisor contemplates withdrawing from the market. Pet.App. at 19a.

In sum, the First Circuit's decision is firmly grounded in the Act and is in accord with the other courts of appeals that have addressed the issue of constructive termination under the PMPA. The decision is hardly one that federalized mere breach of contract claims or in any way increases the limited preemption of state authority provided under the Act.

CONCLUSION

Petitioners have not established any compelling reasons for this Court to grant the Petition. Therefore respondents respectfully request that the Petition be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

SHELL OIL PRODUCTS COMPANY LLC; MOTIVA ENTERPRISES LLC; SHELL OIL COMPANY, INC.,

Petitioners,

v.

MAC'S SHELL SERVICE, INC.; CYNTHIA KAROL; JOHN A. SULLIVAN; AKMAL, INC.; SID PRASHAD; RAM CORPORATION, INC.; J&M AVRAMIDIS, INC.; STEPHEN PISARCZYK,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Shell Oil Products Company LLC, Motiva Enterprises LLC, and Shell Oil Company, Inc., state that the corporate disclosure statement included in the petition remains accurate.

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REPLY FOR PETITIONERS

Plaintiffs do not dispute that the issue in this case is parallel to the issue they raise in their petition (No. 08-240). Nor do they seriously dispute the importance of the question presented. Instead, plaintiffs argue there is no circuit conflict. That claim is plainly wrong: The courts of appeals are squarely divided in both reasoning and results. Given Congress's desire for uniformity in this area, see Pet. 24-25, that conflict warrants this Court's review.

I. THE CIRCUITS ARE SQUARELY DIVIDED

The First Circuit below, like the Fourth Circuit in *Barnes* v. *Gulf Oil Corp.*, 795 F.2d 358 (4th Cir. 1986), held that a dealer can claim it was "constructively terminated" in violation of the PMPA without showing a "total breach" of its franchise agreement, a "complete deprivation of a statutory element of the franchise" (*i.e.*, the trademark, motor fuel, or premises), or an "actual severance of the relationship." Pet. App. 18a-19a. Instead, those courts allow claims for constructive termination "'even though the plaintiffs continue[] to operate the business.'" *Id.* at 18a. As explained in the petition (at 17-20), the Ninth and Sixth Circuits reached the opposite result in *Portland 76 Auto/Truck Plaza, Inc.* v. *Union Oil Co. of California*, 153 F.3d 938 (9th Cir. 1998), and *Clark* v. *BP Oil Co.*, 137 F.3d 386 (6th Cir. 1998).

A. Plaintiffs ignore the Ninth Circuit's actual reasoning in *Portland 76*. The Ninth Circuit "assume[d] for purposes of discussion * * * that constructive termination may give rise to a claim under the Act," but held that a dealer could not claim it was constructively terminated if it continued to operate its franchise: "For the assignment to have amounted to a constructive termination," the court held, "it would have had to force Portland 76 out of its business." 153 F.3d at 948. The dealer thus lost because it "stayed in business until the time came for re-

newal." *Ibid.* That holding cannot be reconciled with the First Circuit's holding below that actual severance is not required because, in its view, "requir[ing] an actual abandonment of years of work and investment * * * would be unreasonable.'" Pet. App. 18a. The dealers here clearly would have lost under the Ninth Circuit's standard: Like Portland 76, they were "not force[d] * * * out of business" but rather "stayed in business until the time came for renewal." 153 F.3d at 948. Plaintiffs assert that *Portland 76* is irrelevant because "the Ninth Circuit has not yet decided whether a constructive termination claim is viable under the PMPA." Br. in Opp. 14. But speculation that the Ninth Circuit might eventually reject constructive termination claims altogether—creating an even *wider* rift with the First and Fourth Circuits—does not eliminate the square conflict that already exists.

Plaintiffs suggest that the Ninth Circuit's earlier decision in *Little Oil Co.* v. *Atlantic Richfield Co.*, 852 F.2d 441 (9th Cir. 1988), authorized constructive termination claims whenever a franchisor engages in "unduly burdensome and overbearing" conduct. Br. in Opp. 15. But *Little Oil* held no such thing. After the jury there rejected a constructive termination claim, the *dealer* challenged the instructions on appeal. 852 F.2d at 444. Noting the "paucity of authority" supporting constructive termination claims, the Ninth Circuit held that the district court had not erred in requiring proof of overreaching because, "[i]f the [conduct was] not 'unduly burdensome and overbearing,' no 'constructive' termination could have occurred." *Id.* at 444-445. *Little Oil* did not address whether there was anything *else* a dealer had to prove. By contrast, when *Portland 76* reached that issue 10 years later, it squarely held that the dealer must also show it was "force[d] * * * out of its business." 153 F.3d at 948.

B. Plaintiffs fare no better in distinguishing the Sixth Circuit's decision in *Clark*. They claim that there was no

breach of the agreement in *Clark*—that the "open price term * * * could be freely changed." Br. in Opp. 1, 14. But the Sixth Circuit expressly held that the constructive termination claim failed *whether or not* there was a breach, because the dealer continued to operate his franchise with all three statutory elements (trademark, fuel, and premises): *"[E]ven if Clark can establish a breach of the price term*, it does not trigger the protections of the PMPA since he still retains use of BP's trademark, use of the Emerald-Mart premises, and continues to receive BP-branded motor fuel." 137 F.3d at 392 (emphasis added). Because "Clark d[id] not claim that [the franchisor] *refuses to supply him with gasoline*," his claim failed. *Id.* at 391 (emphasis added).

The court later questioned whether Clark could show a breach. 137 F.3d at 392. Clark argued that the open price term was breached in light of the Tennessee Commercial Code's good-faith requirement and the parties' course of dealing. *Ibid.* But the court declined to resolve that claim, stating that the "PMPA is simply not concerned with" it. *Ibid.* The court instead directed the dealer to pursue the argument "in state court on the remand of his claim for breach of [contract]." *Ibid.* Plaintiffs cannot distinguish *Clark* on a ground—the purported absence of a breach—that the court declined to resolve and expressly deemed irrelevant.

Plaintiffs also urge that both *Clark* and the decision below relied on *May-Som Gulf, Inc.* v. *Chevron U.S.A., Inc.*, 869 F.2d 917 (6th Cir. 1989). Br. in Opp. 6-8, 12-13. But the fact that two cases cite the same precedent hardly negates the conflict. *May-Som* held that a franchisee claiming constructive termination by an assignee "must prove either: (1) that by making the assignment, the franchisor breached one of the three statutory components of the franchise agreement * * * ; or (2) that the franchisor made the assignment in violation of state law."

869 F.2d at 922. The case thus held that a breach is *necessary* for a constructive termination, not sufficient. In *May-Som*, the plaintiff could not even show a breach, so there was no reason to address whether dealers could claim constructive termination while continuing to operate. See *id.* at 923. *Clark*, by contrast, reached that issue. And *Clark* held that, "even if [the dealer] can establish a breach of the price term," he could not show constructive termination because he continued to operate using the same trademark, premises, and fuel. 137 F.3d at 392.

Plaintiffs' remaining efforts to distinguish *Clark* rely on portions of the opinion that address unrelated issues. For example, the passage in *Clark* distinguishing *Barnes* (Br. in Opp. 14) concerned whether the assignment violated state law. 137 F.3d at 393. Although plaintiffs now attempt to reinvent the First Circuit's rationale as resting on that ground—asserting that Shell's assignments to Motiva were "'invalid under state law'" because they "increased the dealers' burdens," Br. in Opp. 13, 17—the First Circuit's opinion does not rely on such a theory. The theory also lacks merit: While Motiva's *cancellation of the rent subsidy* more than a year after the assignments may have "increased the dealers' burdens," the *assignments themselves* had no such effect. See *Portland 76*, 153 F.3d at 948 (rejecting a similar argument).[1]

Plaintiffs simply cannot escape the fact that they would have lost in the Sixth Circuit under *Clark*. Just as the plaintiff in *Clark* claimed the refiner charged more for fuel than the franchise agreement allowed, 137 F.3d

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[1] Plaintiffs also assert that *Clark* involved "price supports" found to be unenforceable. Br. in Opp. 14. But the "price supports" claim was separate from the challenge to the underlying price term. See 137 F.3d at 393. Only the latter claim was at issue in the relevant portion of the opinion. See *id.* at 391-392.

at 392, plaintiffs here claimed that Motiva charged more for rent than the franchise agreements allowed. But just as the refiner in *Clark* did not "refuse[] to supply [the dealer] with gasoline," *id.* at 391, Motiva did not refuse to allow plaintiffs to occupy the premises. The Sixth Circuit held that a mere breach of the price term for a statutory franchise element is not the same as a *refusal to provide* that element, and thus does not establish a "constructive termination" under the PMPA. *Id.* at 392. By contrast, the First Circuit held that a breach of the price term for a statutory element—the lease of the premises—*was* sufficient to establish a "constructive termination" here.

C. Plaintiffs make no effort to dispute that the district courts are in total disarray. See Pet. 22. They urge that those conflicting decisions reflect a "misreading of circuit court decisions." Br. in Opp. 15 n.5. But they offer no reason to accept their own self-serving assertion of settled uniformity when district courts across the country perceive no such consensus.

Plaintiffs also concede (at 11-12 n.4) that the decision below conflicts with the Fifth Circuit's decision in *McGinnis* v. *Star Enterprise*, No. 93-1234, 1993 WL 455587 (5th Cir. Oct. 21, 1993). *McGinnis* declared that "[t]he plain meaning of the statute does not provide for 'constructive termination,'" and refused to allow such a claim where the plaintiff "continued as a franchisee." *Id.* at *4. That decision, although unpublished, is precedential under the Fifth Circuit's rules. See *Abrams Shell* v. *Shell Oil Co.*, 343 F.3d 482, 487 (5th Cir. 2003) (citing 5th Cir. R. 47.5.3). And it rejects the theory on which plaintiffs prevailed here.[2]

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[2] Plaintiffs urge that *McGinnis* is "at odds with the recognition in *Abrams Shell* that the Act provides for constructive termination." Br. in Opp. 12 n.4 (citation omitted). But *Abrams Shell* nowhere recognizes such claims, much less where the plaintiff continues as a

II. THE ISSUE IS IMPORTANT

Plaintiffs do not seriously dispute the importance of the question presented. They agree that tens of thousands of dealers and their franchisors have similar agreements. Pet. in No. 08-240, at 3. They do not deny the harm the legal uncertainty inflicts on an industry with ongoing restructurings. Pet. 27. Instead, they single out the impact on federal-state relations (Pet. 25-26), denying that the decision below allows plaintiffs to convert ordinary breach-of-contract claims into federal constructive termination claims under the PMPA. Br. in Opp. 16-17.

Plaintiffs' inability to articulate a coherent distinction between mere contract breaches and constructive terminations, however, underscores the decision's impact. According to plaintiffs, this case involved a constructive termination rather than a mere contract breach because the rent subsidy was "of such material importance to the dealers" that its cancellation "effectively terminated" their franchise agreements, leaving them operating their franchises under "what in reality were Motiva leases sans the rent subsidies." Br. in Opp. 16-17. That metaphysical description provides no meaningful standard. Plaintiffs nowhere explain what makes a breach of a price term "so material" that it transmogrifies into a termination even though the dealer continues to operate as a franchisee. Under plaintiffs' standard, franchisors will confront PMPA claims in virtually every contract dispute involving rent, fuel supply, or trademark rights, so long as the dealer alleges that the breach was sufficiently "material" to it. That does not merely allow dealers to

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franchisee. Rather, the court noted that a prior Fifth Circuit decision had "declin[ed] to decide whether the PMPA permitted constructive termination claims." 343 F.3d at 487. Following that earlier decision, it held that the claims failed *even if* constructive termination was a valid theory. See *id.* at 487-488.

distort the PMPA by leveraging ordinary contract disputes into federal lawsuits threatening punitive damages and attorney's fees. It also undermines the traditional state authority that Congress meant to preserve when it limited the PMPA—and its preemptive scope—to terminations and non-renewals.

III. THE FIRST CIRCUIT'S DECISION IS INCORRECT

The PMPA, by its terms, provides a cause of action for "terminat[ion]" of a franchise. 15 U.S.C. §§ 2802(a)(1), 2805(a). Termination implies a complete end to an agreement—an act that "extinguish[es] future obligations of both parties." 13 *Corbin on Contracts* § 67.2, at 12 (rev. ed. 2003); see also 17B C.J.S. *Contracts* § 447, at 65 (1999). Thus, a mere breach of contract, even if material, does not "terminate" the contract where both parties otherwise continue to perform. Plaintiffs concede that, in the employment and landlord-tenant contexts, a mere breach cannot amount to a "constructive discharge" or "constructive eviction" unless the employee quits or the tenant moves out. Br. in Opp. 17 n.6. They offer no good reason why that same understanding should not apply here.

Plaintiffs urge that "one cannot conceive of a constructive discharge or constructive eviction without a complete break in the employment or landlord relationship." Br. in Opp. 17 n.6. But that proves our point. An employee might claim he was "constructively discharged" because, even though he continued to work at the company, his employer breached an agreement to pay a bonus; or a tenant might assert he was "constructively evicted" because, even though he continued in the premises, the landlord did not give him a promised rent rebate. No one, of course, would accept such transparent efforts to convert ordinary breaches into "terminations." But that merely shows why plaintiffs' parallel theory—that can-

cellation of the rent subsidy "constructively terminated" their franchises even though they continued to operate as franchisees—lacks merit as well.

Nor does Shell's prior assignment of the agreements to Motiva somehow convert Motiva's alleged breach of contract into a "termination." The PMPA explicitly preserves assignment rights. 15 U.S.C. § 2806(b)(1). Plaintiffs cannot explain why, if a mere breach would not implicate the PMPA where the dealer continues to operate, combining that breach with an otherwise valid prior assignment would do so. And even if the assignment mattered, it would not distinguish *Portland 76* or *Clark*, both of which also involved assignments.

Plaintiffs seek refuge in the legislative history's reference to "traditional principles of equity." Br. in Opp. 17-19. But legislative history cannot create a remedy that statutory text omits. See *Connecticut Nat'l Bank* v. *Germain*, 503 U.S. 249, 253-254 (1992). And the cited legislative history merely clarifies that, although the Act preserves state-law assignment rights, it does not license assignments that "conflict" with the "Federal termination provisions." S. Rep. No. 95-731, at 42-43 (1978). That language simply confirms that assignments that result in terminations are invalid. It does not license courts to invoke equitable principles to eviscerate the settled meaning of the word "terminate."[3]

Plaintiffs emphasize their theory that Shell sought to "squeeze them out of their franchises." Br. in Opp. 19-21. But an alleged bad motive cannot transform a breach into a termination. Motive can be relevant to whether a non-

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[3] Plaintiffs assert that the petition "equate[s] termination with nonrenewal." Br. in Opp. 17. Not so. A termination occurs if the franchisor ends the franchise "prior to the conclusion of the term"; a nonrenewal occurs if it fails to offer a new agreement at the *end* of the term. See 15 U.S.C. § 2802(a); S. Rep. No. 95-731, at 15.

renewal or termination was *justified*. See, *e.g.*, 15 U.S.C. § 2802(b)(3)(A) (failure to agree to new contract terms); *id.* § 2802(b)(2)(E) (withdrawal from market). But nothing in the Act suggests that whether a termination *occurred* depends on the franchisor's motive.[4]

IV. THIS CASE IS AN IDEAL VEHICLE

Plaintiffs' own petition from the same judgment (No. 08-240), which seeks review of the "constructive nonrenewal" ruling, underscores the need for review here. The questions presented in the two petitions are not merely related; they are inextricably linked. Plaintiffs

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[4] In a footnote, plaintiffs assert that Shell and Motiva failed to preserve their claim by not objecting to the jury instructions. Br. in Opp. 11 n.3. The First Circuit reached the merits without even mentioning that assertion, and with good reason—the argument is doubly meritless. First, Shell and Motiva *did* object to the jury instructions. See C.A. App. 1274 ("If you lose one of the three [statutory franchise] elements, you've got a constructive termination. If you don't, you don't. So I think that we object to this instruction * * *."). Second, the First Circuit addressed this issue, not as a jury-instruction challenge, but in the context of Shell and Motiva's sufficiency-of-the-evidence challenge. Pet. App. 21a. A party need not object to jury instructions to preserve a sufficiency challenge. See *Boyle* v. *United Techs. Corp.*, 487 U.S. 500, 513-514 (1988); 9B Wright & Miller, *Federal Practice and Procedure* § 2537, at 624-625 (3d ed. 2008). Plaintiffs do not dispute that, if Shell and Motiva's construction of the Act is correct, the evidence failed to establish the required termination, since plaintiffs continued to operate their franchises. Nor can plaintiffs plausibly dispute that Shell and Motiva preserved their sufficiency challenge in pre- and post-verdict Rule 50 motions. See Pet. 11; Pltfs. C.A. Supp. App. 118-119 ("[T]here has been no evidence presented to support the Plaintiffs' claim that they have been constructively terminated. * * * Plaintiffs' claim[] * * * is that the Plaintiffs did not like certain changes implemented by Defendants, not that their franchises have been terminated * * *."); *id.* at 156-157 & n.15 ("[O]nly the act of termination * * * gives rise to a PMPA claim. * * * [T]here has never been any claim that Shell terminated plaintiffs' right to occupy the premises.").

themselves urge that "the First Circuit's analysis of the constructive termination claim is incompatible with [its resolution of the] constructive nonrenewal claim." Pet. in No. 08-240, at 29. Given that close relationship, it would make little sense to grant one petition without the other. This Court, for example, could not sensibly affirm the First Circuit's rejection of the constructive non-renewal claims while leaving in place what both sides agree is an irreconcilable ruling on constructive termination. The two petitions involve the same judgment, the same parties, the same record, and circuit splits on twin provisions of the same statute. If the Court is inclined to grant one petition, it should grant both.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MAC'S SHELL SERVICE, INC., ET AL., PETITIONERS

v.

SHELL OIL PRODUCTS COMPANY LLC, ET AL.

SHELL OIL PRODUCTS COMPANY LLC, ET AL., PETITIONERS

v.

MAC'S SHELL SERVICE, INC., ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

The Petroleum Marketing Practices Act (PMPA or Act), 15 U.S.C. 2801 *et seq.*, limits the circumstances in which petroleum refiners or distributors may "terminate" a franchise or "fail to renew" a franchise relationship involving the sale or supply of motor fuel.

In No. 08-372, *Shell Oil Products Co. LLC* v. *Mac's Shell Service, Inc.*, the question presented is whether a franchisee may assert a claim of "constructive termination" under the PMPA when it continues to operate the franchise by purchasing the same fuel, reselling it under the franchisor's trademark, and occupying the leased marketing premises.

In No. 08-240, *Mac's Shell Service, Inc.* v. *Shell Oil Products Co. LLC*, the question presented is whether a franchisee who signs a renewal agreement "under protest" and operates under the terms of the agreement may maintain a claim for "constructive nonrenewal" under the Act.

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In the Supreme Court of the United States

No. 08-240

MAC'S SHELL SERVICE, INC., ET AL., PETITIONERS

v.

SHELL OIL PRODUCTS COMPANY LLC, ET AL.

No. 08-372

SHELL OIL PRODUCTS COMPANY LLC, ET AL., PETITIONERS

v.

MAC'S SHELL SERVICE, INC., ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the order of this Court inviting the Solicitor General to express the views of the United States. In the view of the United States, both petitions for a writ of certiorari should be granted.

STATEMENT

1. The Petroleum Marketing Practices Act (PMPA or the Act), 15 U.S.C. 2801 *et seq.*, prohibits petroleum refiners and distributors from "terminat[ing]" any franchise involving the sale or supply of motor fuel "prior to the con-

clusion of the term, or [its] expiration," or from "fail[ing] to renew any franchise relationship," except for enumerated reasons and after written notice. 15 U.S.C. 2801(1)(A), 2802, 2804.[1] The Act defines the term "franchise" to include any contract allowing a retailer or distributor to use the franchisor's trademark, to purchase motor fuel for resale, or to occupy leased marketing premises. 15 U.S.C. 2801(1)(B). These three types of agreements are commonly described as the "statutory elements of the franchise." Pet. App. 3 n.1.[2] The term "franchise relationship" is defined as the parties' "respective motor fuel marketing or distribution obligations and responsibilities" in connection with the franchise. 15 U.S.C. 2801(2). "'[T]ermination' includes cancellation," and "fail to renew" means "a failure to reinstate, continue, or extend the franchise relationship." 15 U.S.C. 2801(14) and (17).

If a franchisor violates specified provisions of the PMPA, its franchisee may bring suit in federal district court. 15 U.S.C. 2805. The Act provides for a wide range of remedies, including compensatory damages, reasonable attorneys' fees and expert costs, punitive damages, and "such equitable relief" as the court deems necessary to address the statutory violation. 15 U.S.C. 2805(a), (b)(1), (d) and (e). The Act also requires district courts to grant preliminary injunctive relief preserving the status quo if the franchisee shows that its franchise has been terminated or that its franchise relationship has not been renewed, that "there exist sufficiently serious questions going to the merits to make such questions a fair ground for litigation," and that the balance of equities favors such relief. 15 U.S.C.

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[1] Special rules apply to trial and interim franchises. 15 U.S.C. 2803.

[2] Unless otherwise noted, all references to "Pet." and "Pet. App." are to the petition and appendix in No. 08-240.

2805(b)(2). The PMPA preempts state law governing termination and nonrenewal to the extent such law is inconsistent with the Act. 15 U.S.C. 2806(a)(1).

2. Between 1982 and 1998, Shell Oil Products Co. LLC (Shell) offered its franchisees a rent subsidy called the Variable Rent Program (VRP). Pet. App. 3. That subsidy reduced the monthly rent by a set amount for every gallon of gasoline the franchisee sold above a specified threshold. *Ibid.* Shell renewed the subsidy in annual notices to franchisees. *Ibid.* Although the notices "explicitly provided for cancellation with thirty days' notice," various oral representations suggested that "the [s]ubsidy or something like it would always exist." *Id.* at 3-4.

In 1998, Shell and Texaco created a joint venture, Motiva Enterprises LLC (Motiva), to conduct their domestic gasoline marketing operations. Pet. App. 3. Shell assigned its rights and duties under the relevant franchise contracts to Motiva, which initially replaced the VRP with a different rent subsidy. *Ibid.* On January 1, 2000, however, Motiva ended that replacement subsidy, causing the Shell stations to pay "much more rent," and did not include the subsidy in the new leases it offered Shell franchisees when their franchise agreements expired. *Id.* at 4.

3. On July 27, 2001, 63 Shell dealers filed suit in federal district court, asserting state and federal claims. The dealers principally alleged that their property leases had incorporated the rent subsidy and that the elimination of the subsidy breached those leases. Pet. App. 5-6. In addition to alleging violations of their state-law contract rights, the dealers asserted that Shell's and Motiva's conduct had violated two provisions of the PMPA. First, the dealers alleged that Shell had "constructively terminated" their franchises, in violation of 15 U.S.C. 2802(a)(1), by assigning the contracts to Motiva and eliminating the rent subsidy. Pet.

App. 6. Second, the dealers claimed that Motiva's offer of new contracts without the rent subsidy amounted to a "constructive nonrenewal" of their franchise relationships, in violation of 15 U.S.C. 2802(a)(2), even though the dealers had signed new agreements "under protest." Pet. App. 6, 27.

On July 30, 2003, the dealers moved for a preliminary injunction under the PMPA. The district court denied the motion, explaining that because the dealers had "waited years before seeking preliminary injunctive relief," the court was unable to "turn the clock back" and "preserve the status quo." Pet. App. 49-50 (citation omitted).

After a 15-day trial involving a group of eight dealers selected by the court, the jury found against Shell and Motiva on all claims and awarded the dealers $3.3 million, including $1.3 million on the constructive termination claim and $1.2 million on the constructive nonrenewal claim. C.A. App. 548-558. The district court also awarded the dealers $1.16 million in attorneys' fees and $209,000 in expert witness fees under the PMPA. C.A. Def. Br. Addendum 27-29, 42. The court denied the dealers' request for punitive damages, however, observing that the elimination of the rent subsidy was partly attributable to changes in the industry and efforts to harmonize Shell's and Texaco's rent structures. Pet. App. 45. The district court denied the defendants' motions for judgment as a matter of law, 08-372 Pet. App. 34a-54a, and the defendants appealed.

4. The court of appeals affirmed in part, reversed in part, and remanded for reconsideration of costs and fees. Pet. App. 1-41. On the PMPA claims, the court affirmed the judgment on the constructive termination claim but reversed the judgment on the constructive nonrenewal claim. *Id.* at 20-32.

a. In sustaining the jury verdict on the constructive termination claim, the court of appeals explained that a franchisee may establish a violation of Section 2802(a)(1) by showing that, as a result of assigning the franchise, "the franchisor breached one of the three statutory components of the franchise agreement (the contract to use the refiner's trademark, the contract for the supply of motor fuel, or the lease of the premises)." Pet. App. 20-21 (citation omitted).[3] The court concluded that the dealers had made that showing because they had "prove[d] to the jury's satisfaction" that, by eliminating the rent subsidy, "Motiva breached the lease component of the franchise agreements." *Id.* at 21.

The court rejected the defendants' argument that, to constitute a constructive termination under the PMPA, any "breach must amount to a total deprivation of one of the three elements of the franchise." Pet. App. 22; see *id.* at 24. The court held that the "appropriate threshold" for a constructive termination claim was reflected in the jury instructions given in this case, which stated that the breach must constitute "such a material change that it effectively ended the lease, even though the plaintiffs continued to operate the business." *Id.* at 23. The court acknowledged that the doctrines of constructive discharge in employment law and constructive eviction in landlord-tenant law "require an actual severance of the relationship: [t]he employee must leave the workplace; the tenant must move out." *Id.* at 22-23. The court concluded, however, that such a rule should not apply under the PMPA because "sunk costs, optimism, and the habit of years might lead franchisees to try to make the new arrangements work, even when the terms have changed so materially as to make success impossible," and the "con-

[3] The court also stated that a franchisee could establish constructive termination if an assignment of the franchise violated state law. Pet. App. 21. The dealers do not appear to have asserted such a theory.

gressional plan would be frustrated by requiring a franchisee to go out of business before invoking the protections of the PMPA." *Id.* at 23 (citation omitted).

b. The court of appeals reversed the judgment of liability on the constructive nonrenewal claim, concluding that the PMPA does not encompass such a claim "where the franchisee has signed and operates under the renewal agreement complained of." Pet. App. 27-32. While recognizing that the Ninth Circuit had permitted recovery on a constructive nonrenewal theory in *Pro Sales, Inc.* v. *Texaco, U.S.A.*, 792 F.2d 1394 (1986), the court of appeals observed that "*Pro Sales* has been rejected by the other circuits to consider the issue." Pet. App. 28 (citing *Abrams Shell* v. *Shell Oil Co.*, 343 F.3d 482 (5th Cir. 2003), and *Dersch Energies, Inc.* v. *Shell Oil Co.*, 314 F.3d 846 (7th Cir. 2002)). Citing the structure of the PMPA, which requires notice of nonrenewal and permits the franchisee to seek preliminary injunctive relief under a relaxed standard, the court explained that "Congress intended to limit the reach of the PMPA to cases where either a notice is given or an actual nonrenewal has taken place." *Ibid.* The court therefore concluded that the Act "requires that franchisees faced with objectionable contract terms refrain from ratifying those terms by executing the contracts (even 'under protest')." *Id.* at 30.

Because in this case "the Dealers signed the new agreements 'under protest' and continued in operation under the new agreements," Pet. App. 30, the court of appeals held that they could not claim constructive nonrenewal. Were the rule otherwise, the court explained, a "franchisee [could] sign the contract and simultaneously challenge it," giving the franchisee the benefit of the contract with nothing to lose "[i]f its claims were rejected by the courts." *Ibid.* In

the court's view, that result would violate "the balance Congress has struck" in the PMPA. *Id.* at 30-31.

DISCUSSION

The court of appeals erred in sustaining the jury verdict on the claim of constructive termination under 15 U.S.C. 2802(a)(1). Notwithstanding the elimination of their rent subsidy, the dealers continued to operate their franchises by using Shell's trademark, purchasing Shell gasoline for resale, and occupying the leased premises. A franchisor does not "terminate" a franchise within the meaning of Section 2802(a)(1), even "constructively" or informally, unless it brings at least one statutory element of the franchise to an end. The court of appeals correctly concluded, however, that the defendants in this case did not "fail to renew any franchise relationship" within the meaning of Section 2802(a)(2) because the franchisees signed and operated under renewed franchise agreements.

This Court should grant both petitions. The circuits are divided on both questions presented, which raise similar issues that are of substantial importance to a crucial sector of our economy. This Court's guidance would benefit franchisors and franchisees in the petroleum industry by clarifying the scope of the PMPA and by removing the uncertainty regarding the interaction between state and federal remedies in this context. Inconsistent interpretations of the PMPA by different courts of appeals also undermine Congress's intent to prescribe nationally uniform standards on the matters covered by the Act.

I. THE COURT SHOULD GRANT THE PETITION IN NO. 08-372 AND HOLD THAT THE DEFENDANTS DID NOT "TERMINATE" THE RELEVANT FRANCHISES WITHIN THE MEANING OF THE PMPA

A. The Court Of Appeals Erred In Holding That A Franchisee May Recover For Constructive Termination Even If It Continues To Sell The Same Fuel, Use The Same Trademark, And Occupy The Same Premises

The court of appeals held that "a breach of the franchise agreement need not result in complete deprivation of a statutory element of the franchise to support a constructive termination" claim under 15 U.S.C. 2802(a)(1). Pet. App. 24. That conclusion was incorrect. Under any usual understanding of the statutory language, a franchisor can be said to "terminate" an existing franchise within the meaning of Section 2802(a)(1) only when it cancels or forces an end to the franchisee's purchase of the franchisor's fuel, its use of the franchisor's trademark, or its occupation of the leased marketing premises. Because the dealers in this case continued to exercise each of those three prerogatives long after the defendants withdrew the rent subsidy, the defendants cannot be found to have "terminate[d]" the franchises in violation of the PMPA.

1. The PMPA does not establish general federal standards of fair dealing in petroleum marketing but rather addresses only a narrow category of conduct. *Inter alia*, the Act provides that, subject to specified exceptions, a motor-fuel franchisor may not "terminate any franchise" before its expiration date. 15 U.S.C. 2802(a)(1). The Act defines the term "franchise" to encompass "a set of definite agreements" concerning the lease of the marketing premises, the supply of the franchisor's motor fuel, and the use of the franchisor's trademark. Pet. App. 7-8; 15 U.S.C. 2801(1)(B).

"Terminate" is a well understood term that had the same meaning when Congress enacted the PMPA in 1978 as it has now: "bring to an end." *The Random House Dictionary of the English Language* 1465 (1966). Consistent with that common understanding, Congress provided in the PMPA that "[t]he term 'termination' includes cancellation," 15 U.S.C. 2801(17), a word that similarly denotes an end or nullification. Thus, a franchisor can "terminate" a "franchise" under the PMPA only by engaging in conduct that brings at least one of the three statutory components of the franchise to an end.

A franchisor (or its assignee) typically terminates a franchise by explicitly canceling one or more of the franchise elements prior to the expiration date. Even without such an explicit cancellation, however, the franchisor may "terminate" the franchise within the meaning of Section 2802(a)(1) by engaging in conduct that effectively forces an end to one of the statutory elements. Thus, a franchisor can "terminate" a franchise by offering the franchisee fuel on terms so disadvantageous as to amount to a refusal to supply, or by taking actions that, as a practical matter, prevent the franchisee from continuing to occupy the leased premises. In those circumstances, the "termination" may be termed "constructive," although the term "informal" is more accurate. See *Dersch Energies, Inc.* v. *Shell Oil Co.*, 314 F.3d 846, 864 n.17 (7th Cir. 2002) ("In the context of the PMPA, constructive means 'not directly expressed, but inferred,' *The Compact Oxford English Dictionary* 322 (2d ed. 1989), i.e., an indirect or informal termination or nonrenewal.").

A franchisor cannot reasonably be said to "terminate" a franchise, however, when its franchisee continues to exercise all three prerogatives that the franchise entails. The court of appeals erred in holding that the elimination of the rent subsidy could constitute a termination of the fran-

chises when the dealers continued to occupy the leased premises, use Shell's trademark, and purchase Shell gasoline for resale. Pet. App. 23. Although the court purported to equate "termination" with conduct that "effectively ended" the franchise, it upheld a verdict in the dealers' favor "even though the [dealers] continued to operate the business[es]" long after the rent subsidy had been withdrawn. *Ibid.*

2. The history and purpose of the PMPA do not support the decision below. The court of appeals regarded its reading of Section 2802(a)(1) as consistent with Congress's intent "to ensure that franchisees benefit from successful investment in their franchises." Pet. App. 24. But the PMPA was a compromise measure designed to "strike a balance between the at times conflicting interests of [franchisors and franchisees]." S. Rep. No. 731, 95th Cong, 2d Sess. 15 (1978) (*Senate Report*); see 123 Cong. Rec. 10,384 (1977) (statement of Rep. Brown) (the Act "represent[s] a delicate and effective compromise"). Congress intended the Act to limit the circumstances in which franchisors can use or threaten the "extreme remedy" of termination. *Senate Report* 18; see *id.* at 29 (suggesting that a franchisee could bring a claim where "the real estate lease or motor fuel supply agreement" was "terminat[ed]" or the trademark license was rendered "valueless"). Yet Congress also "recognize[d] the importance of providing adequate flexibility so that franchisors may initiate changes in their marketing activities to respond to changing market conditions and consumer preferences." *Id.* at 19. Consistent with that recognition, Congress chose not to forbid franchisors from instituting changes that, although unfavorable to the franchisee, do not bring the franchise to an end. See *Dersch Energies*, 314 F.3d at 856 ("[T]he PMPA strikes a balance between the rights of franchisors and the rights of franchisees, by affording franchisees important but limited procedural rights, while at the

same time providing franchisors with significant latitude to respond to changing market conditions."). By expanding the PMPA's coverage to conduct that is not encompassed within its text, the decision below disrupts "the balance Congress has struck." Pet. App. 31.

3. The court of appeals' understanding of the equities in this case was flawed. The court surmised that "sunk costs, optimism, and the habit of years might lead franchisees to try to make the new arrangements work," and it concluded that "[t]o require an actual abandonment of years of work and investment before we recognize a right of action under the PMPA would be unreasonable." Pet. App. 23. But that analysis ignores the existence of state-law remedies. Although Congress intended Section 2802(a)(1) to apply only to terminations, state-law mechanisms remain available for breaches of contract that do not bring an end to the franchise. The dealers' continued enjoyment of the three essential elements of the franchise did not (as the jury's verdict on their state-law claims makes clear) prevent them from obtaining meaningful redress for the contract breaches that were found to have occurred.[4] That continuing relationship simply remitted the dealers to state law to obtain relief on their contractual claims.

4. The decision below undermines the PMPA's goal of establishing "a single, uniform" federal standard for termi-

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[4] The PMPA preempts any inconsistent state or local "law or regulation" governing the "termination" of a petroleum marketing franchise or the "nonrenewal" of a franchise relationship. 15 U.S.C. 2806(a). Outside of those specific areas, however, Congress neither provided a federal remedy for breaches of franchise agreements nor limited States' authority to do so. See H.R. Rep. No. 737, 103d Cong., 2d Sess. 2-3 (1994) ("PMPA preemption does not extend to state regulation of underlying contract provisions."); *Senate Report* 42 ("State laws dealing with [other] aspects of the relationship are not preempted.").

nation, *Senate Report* 19, by prescribing a confusing and indeterminate test for deciding whether a franchisor has "terminate[d]" a franchise. The court of appeals disavowed a holding that "any material breach of the lease would necessarily be sufficient to sustain the constructive termination claim." Pet. App. 23. It indicated instead that the relevant contract breach must effect "such a material change that it effectively ended the lease, even though the plaintiffs continued to operate the business." *Ibid.* But the court offered no workable standard for determining whether a particular contract breach has "effectively ended" the franchise when the franchisee is able and willing to continue, for a sustained period, all its operations. Nor could the court have done so, given the essential contradiction involved in declaring "effectively ended" a franchise that is ongoing in each of its basic components.

When a franchisor does not explicitly cancel any of the three elements of a petroleum marketing franchise, its conduct can properly be said to have "terminate[d]" the franchise only if a reasonable franchisee in the circumstances would be effectively compelled to abandon one (or more) of the franchise elements, as where the franchisor's conduct forecloses any reasonable possibility that the business could be operated profitably. And a franchisee cannot reasonably claim to have been subjected to such effective compulsion unless it either (a) actually ceases that aspect of its operations or (b) promptly seeks preliminary injunctive relief preventing the franchisor from carrying out its announced intent to engage in conduct that would leave the franchisee no reasonable alternative but to abandon at least one of the franchise elements.[5] As noted, the court of appeals' view

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[5] A franchisee who receives notice of an impending formal termination need not wait for that event to occur before seeking a preliminary

that a sufficiently material change in the conditions under which a franchisee operates can "effectively" terminate a franchise "even though the [franchisee can] continue[] to operate the business" under the new conditions, Pet. App. 23, provides no coherent standard for identifying a constructive termination. The appropriate inquiry must concern whether continued exercise of the franchise elements is reasonably possible. Where it is, the franchisee cannot succeed on a claim of constructive termination.

B. The Courts of Appeals Are Divided On Whether A Constructive Termination Claim Requires An End To The Franchise

The courts of appeals disagree about whether a franchisor can violate 15 U.S.C. 2802(a)(1) even when the franchisee continues to exercise all the statutory components of the franchise. This Court should grant review to resolve that conflict.

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injunction under the standards set forth in 15 U.S.C. 2805(b)(2). Although that provision requires the franchisee to show that "the franchise of which he is a party has been terminated," 15 U.S.C. 2805(b)(2)(A)(i), it should be construed in accordance with Congress's evident intent to permit franchisees to obtain emergency injunctive relief enabling them to continue operating under the preexisting terms while the dispute is in litigation. Preliminary injunctive relief should similarly be available when a franchisor announces its intent to engage in imminent conduct that would effectively force an end to a franchise element. In an appropriate case, therefore, a franchisee can make out a claim of constructive or informal termination without abandoning any of the basic components of its operation. In this case, however, the dealers "waited years before seeking preliminary injunctive relief," and at that point the court was unable to "turn the clock back." Pet. App. 49-50 (citation omitted). The dealers' continued operation of their franchises for a prolonged period of time after the withdrawal of the rent subsidy belies any contention that the withdrawal effectively compelled them to abandon their businesses.

1. Like the court below, the Fourth Circuit has permitted a franchisee to claim "constructive" termination under the PMPA even though the challenged conduct does "not result in complete deprivation of a statutory element of the franchise" and the franchisee "continue[s] to operate the business." Pet. App. 23-24. In *Barnes* v. *Gulf Oil Corp.*, 795 F.2d 358 (1986), the Fourth Circuit held that a franchisee stated a valid damages claim for termination based on a gasoline price increase that did not end any aspect of the franchise. *Id.* at 359. The court acknowledged that, despite the change in terms, the franchisee was "still in business," selling the franchisor's fuel under its trademark and occupying the leased premises. *Id.* at 360. The court concluded, however, that the price increase constituted a "constructive" termination because the PMPA was intended "to protect franchisees from overbearing, burdensome conduct by the franchisor during the term of the franchise." *Id.* at 362.

Two circuits have taken the opposite view. In *Clark* v. *BP Oil Co.*, 137 F.3d 386 (1998), the Sixth Circuit rejected a claim that an assignee's elimination of "price supports [and] other downward price adjustments" for gasoline constructively terminated a franchise. *Id.* at 389. The court reasoned that, absent a claim by the franchisee that the refiner "refuses to supply him with gasoline" altogether, the price change fell outside the scope of the PMPA because that Act "does not exist to redress every breach of an agreement between a gasoline station franchisee and franchisor." *Id.* at 391. The Sixth Circuit therefore concluded that "even if [the franchisee] can establish a breach of the price term," a change in the price of gasoline is not actionable under the PMPA if the franchisee "still retains use of BP's trademark,

use of the [franchise] premises, and continues to receive BP-branded motor fuel." *Id.* at 392.[6]

Similarly, in *Portland 76 Auto/Truck Plaza, Inc.* v. *Union Oil Co.*, 153 F.3d 938 (1998), cert. denied, 526 U.S. 1064 (1999), the Ninth Circuit refused to permit a termination claim where a franchisee alleged that an assignee had "charged more for fuel, on worse terms," but had not ended the franchise. *Id.* at 948. Although the court "assume[d] for purposes of discussion" that a claim for constructive termination might lie in some circumstances, it held that "[f]or the assignment to have amounted to a constructive termination, it would have had to force [the franchisee] out of its business." *Ibid.* The franchisee failed to establish such a claim, the court concluded, because the franchisee "stayed in business until the time came for renewal" despite the price increase. *Ibid.*[7]

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[6] The dealers contend that *Clark* does not conflict with *Barnes* or the decision below because the franchise agreement in *Clark* contained "an open price term which could be freely changed by BP." 08-372 Br. in Opp. 14. But the court in *Clark* made clear that it rejected the PMPA claim for reasons independent of whether there was a state-law breach of contract. The court concluded that "even if the [franchisee] can establish a breach of the price term," a constructive termination would arise only if the assignee effectively "refuse[d] to supply [the franchisee] with gasoline," ending that statutory element of the franchise. 137 F.3d at 391.

[7] The dealers argue (08-372 Br. in Opp. 14-15) that *Portland 76* is inconsistent with the Ninth Circuit's earlier decision in *Little Oil Co.* v. *Atlantic Richfield Co.*, 852 F.2d 441 (1988). In *Little Oil*, the court approved an instruction requiring "unduly burdensome and overbearing" marketing changes to establish constructive termination. *Id.* at 445. The court in *Little Oil*, however, was responding to a *franchisee*'s challenge to the instruction on the ground that it was too demanding. The court therefore had no occasion to address whether more was required to establish constructive termination. The Ninth Circuit resolved that question in the affirmative in *Portland 76*.

Two other circuits have indicated their agreement with the approach of the Sixth and Ninth Circuits, without squarely resolving the question. The Seventh Circuit remarked in *dicta* that a franchisor "terminate[s]" a franchise within the meaning of the PMPA only when a statutory component of the franchise is "terminated or discontinued." *Dersch Energies*, 314 F.3d at 859. And the Eleventh Circuit "question[ed]" whether the supply component is even "implicate[d]" when a franchisee has not alleged a "refus[al] to supply him with gasoline." *Shukla* v. *BP Exploration & Oil, Inc.*, 115 F.3d 849, 854 (1997).

2. The inconsistent rulings that have produced this circuit conflict frustrate one of the primary purposes of the PMPA. In enacting that statute, Congress sought to establish "a single, uniform set of rules" governing the termination of petroleum franchises so that refiners, many of whom operate nationwide, can organize their affairs without facing a "patchwork" of standards. *Senate Report* 16, 19. The disagreement among the courts of appeals leaves refiners without consistent guidance about the scope of federal law and subjects tens of thousands of franchisees to different rules depending on where they are located. See 08-372 Pet. 27. In addition, because the Act preempts inconsistent state laws relating to franchise terminations, 15 U.S.C. 2806(a)(1); see note 4, *supra*, uncertainty about the scope of the PMPA prohibition on termination could create corresponding uncertainty about the continuing viability of state-law remedies for breach of contract.

II. THE COURT SHOULD GRANT THE PETITION IN NO. 08-240 AND HOLD THAT A FRANCHISEE MAY NOT CLAIM "CONSTRUCTIVE" NONRENEWAL WHEN IT SIGNS AND OPERATES UNDER A RENEWED FRANCHISE AGREEMENT

A. The Court Of Appeals Correctly Concluded That The Dealers Did Not Establish Constructive Nonrenewal

The PMPA provides that, subject to specified exceptions, a franchisor may not "fail to renew any franchise relationship." 15 U.S.C. 2802(a)(2). The court of appeals correctly held that a franchisee cannot claim constructive nonrenewal when, as in this case, it "has signed and operates under the renewal agreement complained of." Pet. App. 32. The PMPA defines "nonrenewal" as the "failure to reinstate, continue, or extend the franchise relationship." 15 U.S.C. 2801(14). A franchisee that signs, and then operates the franchise under, a renewal agreement cannot satisfy that definition.

The dealers resist that plain reading of the Act on several grounds. First, they contend that the decision below creates a "Catch-22" because it forces a franchisee "to choose between accepting an unlawful and coercive contract in order to stay in business and rejecting it and going out of business in order to preserve a cause of action." Pet. 20 (citation omitted). That contention, however, ignores the Act's requirement of advance notice of nonrenewal and its relaxed standards for issuance of a preliminary injunction. A franchisee need not go out of business in order to challenge a franchisor's "take it or leave it" offer to renew on modified terms. When a franchisee believes the proposed agreement is unlawful, it may refuse the offer. A franchisor that elects not to renew in the face of such an inability to agree on new terms must generally give the franchisee 90 days notice prior to the nonrenewal. 15 U.S.C. 2804(a).

During that period, the franchisee may seek a preliminary injunction under 15 U.S.C. 2805, allowing it to continue operating on the preexisting terms while the litigation proceeds. See *Dersch Energies*, 314 F.3d at 863.

Second, the dealers argue (Pet. 21) that the PMPA's remedial scheme is ineffective because few franchisees have the financial resources to bring suit to forestall an unlawful nonrenewal. The PMPA, however, allows successful dealers to recover attorneys' fees, expert costs, compensatory damages, and, in some circumstances, punitive damages. 15 U.S.C. 2805(d)(1). Such provisions are normally considered sufficient to encourage suit. Cf. *City of Riverside* v. *Rivera*, 477 U.S. 561, 578 (1986) ("The function of an award of attorney's fees is to encourage the bringing of meritorious civil rights claims which might otherwise be abandoned because of the financial imperatives surrounding the hiring of competent counsel.") (quoting *Kerr* v. *Quinn*, 692 F.2d 875, 877 (2d Cir. 1982)). And even if some dealers face economic difficulty in pursuing the remedies that the PMPA provides, that fact cannot justify holding the franchisor liable for "fail[ing] to renew [the] franchise relationship," 15 U.S.C. 2802(a)(2), when no failure to renew has actually taken place. Dealers in these circumstances may have a claim against the franchisors under state law, but not under the explicit terms of the PMPA.

Third, the dealers contend (Pet. 24-25) that they preserved their rights under the PMPA by signing the renewed agreements "under protest." Again, however, the PMPA affords franchisees the right to sue only to challenge an unlawful termination or nonrenewal of the franchise; the Act does not furnish them with a cause of action to seek redress for other grievances about the negotiation process or the manner in which a renewal occurred. Because the dealers renewed the franchise agreements, they

had no relevant rights cognizable by suit under the PMPA to preserve. At the most, they possess state-law claims against their franchisors.

B. The Courts Of Appeals Are Divided About Whether A Franchisee May Claim "Constructive" Nonrenewal Under The PMPA When It Signs A Renewed Agreement And Operates Under Its Terms

1. a. In *Pro Sales, Inc.* v. *Texaco, U.S.A.*, 792 F.3d 1394 (1986), the Ninth Circuit recognized a claim of constructive nonrewal under the PMPA, holding that a franchisee that had signed a new agreement and promptly brought suit should not be deemed to have "'renewed' the franchise relationship so as to bar relief under the PMPA." *Id.* at 1399. The Fifth and Seventh Circuits have reached the opposite conclusion. In *Dersch Energies*, the Seventh Circuit "reject[ed] * * * the constructive nonrenewal theory * * * endorsed by the Ninth Circuit" in *Pro Sales* and held that a franchisee who signs a renewal contract cannot claim constructive nonrenewal even if the franchisee signs "under protest." 314 F.3d at 864-865. The Fifth Circuit, in *Abrams Shell* v. *Shell Oil Co.*, 343 F.3d 482 (2003), found "the Seventh Circuit's reasoning in *Dersch Energies* to be especially persuasive" and "reject[ed] the *Pro Sales* approach on the same basis." *Id.* at 489 & n.16.[8]

The court below sided with the Fifth and Seventh Circuits. Pet. App. 30-31. The court noted that *Pro Sales* stands alone among circuit court decisions in recognizing a constructive nonrenewal claim and, citing *Dersch Energies*

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[8] Both the Fifth and Seventh Circuits appear to recognize that a franchisee can claim "constructive" nonrenewal when "at least one of the three essential components of a petroleum franchise has been discontinued." *Abrams Shell*, 343 F.3d at 488 (citation omitted). The dealers have not alleged such a discontinuation.

and *Abrams Shell*, concluded that "Congress intended to limit the reach of the PMPA to cases where either a notice is given or an actual nonrenewal has taken place." *Id.* at 28. The court therefore held that franchisees may not claim "constructive" nonrenewal where they "signed the new agreements 'under protest' and continued in operation under the new agreements." *Id.* at 30.

b. In a footnote, the court of appeals suggested that *Pro Sales* may be distinguishable because, unlike the dealers here and in *Dersch Energies*, the plaintiff in *Pro Sales* "obtained preliminary relief so that it never operated under the new contract." Pet. App. 30 n.14. The court also declined to foreclose the possibility that a franchisee could claim constructive nonrenewal in such circumstances. *Ibid.*

Those observations do not diminish the split among the circuit courts. The Ninth Circuit in *Pro Sales* refused to rest its decision on the franchisee's attainment of a preliminary injunction. See 792 F.2d at 1399 n.6 (noting that such relief "is uniquely within the power of the district court to grant" and "cannot be required to preserve the franchisee's rights under the Act"). That court therefore indicated that it would reach the opposite conclusion from the First, Fifth, and Seventh Circuits even if the franchisee not only signed the new agreement but also operated under its terms. The Fifth and Seventh Circuits, moreover, did not regard the distinction as material to their disagreement with *Pro Sales*. See Pet. App. 30 n.14.

2. Although the decision below regarding constructive nonrenewal is correct and consistent with the decisions of the Fifth and Seventh Circuits, review is warranted to resolve the conflict with the Ninth Circuit's contrary holding in *Pro Sales*. As noted above, see p. 16, *supra*, divergent interpretations of the PMPA leave large numbers of franchisors and franchisees in the petroleum marketing

industry without consistent nationwide guidance as to their rights and obligations under federal and state law and undercut the congressional goal of establishing uniform standards.

In addition, because franchise agreements typically expire every few years, see Pet. App. 30, the question whether a franchisee must choose between signing a new agreement and pursuing a constructive nonrenewal claim recurs with significant frequency. And because the PMPA has a one-year statute of limitations, 15 U.S.C. 2805(a), the *Pro Sales* rule, which "[a]llow[s] a franchisee to sign 'under protest' and then later challenge the renewal," can "extend the period of uncertainty through the entire first year of a [renewal] contract." Pet. App. 30. That uncertainty increases the costs to franchisors exercising their right to implement good faith marketing changes at the time of renewal, see 15 U.S.C. 2802(b)(3)(A), and may lead them to forgo efficient strategies or "abandon the [franchise] model entirely," Pet. App. 31. Consumers ultimately may pay for the increased distribution costs through higher fuel prices. See generally *Leegin Creative Leather Prods., Inc.* v. *PSKS, Inc.*, 127 S. Ct. 2705, 2723 (2007) (explaining that consumers sometimes "suffer the consequences" of distributional inefficiencies).

3. The question presented in No. 08-240 is closely related to the question regarding constructive termination presented in No. 08-372. Both questions arise from the same set of facts and involve analogous arguments about the scope of the PMPA. In view of the importance of the issues presented and the uncertainty created by the existing circuit conflicts, this Court should grant review in both No. 08-240 and No. 08-372.

CONCLUSION

The petitions for a writ of certiorari should be granted.

Respectfully submitted.

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IN THE
Supreme Court of the United States

SHELL OIL PRODUCTS COMPANY LLC, ET AL.,

Petitioners,

v.

MAC'S SHELL SERVICE, INC., ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE AMERICAN PETROLEUM INSTITUTE AS *AMICUS CURIAE* SUPPORTING PETITIONERS

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INTEREST OF *AMICUS CURIAE*

This brief *amicus curiae* in support of petitioners Shell Oil Products Company LLC, Motiva Enterprises LLC, and Shell Oil Company, Inc., is filed on behalf of the American Petroleum Institute. ("API").[1] API is a non-profit District of Columbia corporation for the United States oil and natural gas industry. API's more than 400 members cover all facets of the industry, including exploration, production, transportation, refining, and marketing.

API's members have a significant interest in the issue in this case. The Petroleum Marketing Practices Act, 15 U.S.C. §§ 2801-2806 ("PMPA" or "the Act"), establishes federal standards for the termination or non-renewal by an oil refiner of a service station operator's franchise. The PMPA provides a cause of action against oil refiners that terminate a franchise or fail to renew it in a manner that does not comply with the statute. Thus, many of API's members are subject to suit under the Act.

This case presents the question whether a service station operator that continues to operate its franchise may nevertheless sue the franchisor for wrongful "termination" under the PMPA. The First

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[1] Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus*, its members, or its counsel made a monetary contribution to its preparation or submission. Pursuant to Rule 37.2, counsel of record for all parties received timely notice of *amicus*'s intention to file this brief. The parties have consented in writing to the filing of this brief.

Circuit held that a service station operator can maintain such a suit, but the text and structure of the statute make clear that the First Circuit erred in according the PMPA such broad scope. Because API members may be subjected to PMPA suits, they have a strong interest in having the statute confined to the circumstances to which Congress intended it to apply.

API frequently participates in legislative, administrative, and judicial proceedings that present issues of national concern, including issues arising under the PMPA.[2] API believes that its participation as *amicus curiae* in this case will offer the Court an industry-wide perspective on the question presented.

STATEMENT

1. Congress enacted the PMPA to establish "minimum federal standards governing the termination and nonrenewal of franchise relationships for the sale of motor fuel by the franchisor or supplier of such fuel." S. Rep. No. 731, 95th Cong., 2d Sess. (1978), at 15. Congress sought to displace "an uneven patchwork of [state] rules governing franchise relationships" with a "single, uniform set of rules governing the grounds for termination . . . and the notice which franchisors must provide franchisees prior to termination of a franchise." *Id.* at 19. To promote "certainty and

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[2] *See, e.g., Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007); *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955 (2007); *Texaco, Inc. v. Dagher*, 547 U.S. 1 (2006); *Texaco, Inc. v. Hasbrouk*, 496 U.S. 543 (1990).

uniformity in franchise relationships which permeate a nationwide motor fuel distribution and marketing network," the PMPA "preempts state law in the subject areas in which the federal legislation deals, i.e., termination and non-renewal of franchise relationships and the notice applicable thereto" if the state law "is not the same as the applicable provision" of the PMPA. *Id.* at 16. *See* 15 U.S.C. § 2806(a)(1).

The PMPA defines a "franchise" to mean the use by a franchisee of "a trademark which is owned or controlled by" a refiner. 15 U.S.C. § 2801(1)(A). The term also includes the contract for the supply of motor fuel and the lease of the premises on which the motor fuel is sold. *Id.* § 2801(1)(B). Courts refer to these three components of the franchise as the "statutory element[s]" of the franchise. Pet. App. 18a. The PMPA also states that "the term 'termination' includes cancellation." 15 U.S.C. § 2801(17).

In setting federal standards for termination of a franchise, Congress attempted to "strike a balance between" (S. Rep. No. 731, at 15) franchisees' interest in avoiding "arbitrary or discriminatory termination" (*id.*) and franchisors' need for "adequate flexibility" to "initiate changes in their marketing activities to respond to changing market conditions and consumer preferences" (*id.* at 19). Concerned about franchisors "resort[ing] to termination of the franchise for the most technical or minor violations of the contract" (*id.* at 18), Congress enumerated the grounds on which the franchisor may lawfully terminate the franchise. *See* 15 U.S.C. § 2802(b)(2). Those grounds include a failure by the franchisee to

comply with a franchise provision that "is both reasonable and of material significance," *id.* § 2802(b)(2)(A); "[a] failure by the franchisee to exert good faith efforts to carry out" the franchise, *id.* § 2802(b)(2)(B); "[t]he occurrence of an event which is relevant to the franchise relationship" and which renders termination of the franchise "reasonable," *id.* § 2802(b)(2)(C); a written agreement between the franchisor and franchisee to terminate the franchise, *id.* § 2802(b)(2)(D); and a "determination made by the franchisor in good faith and in the normal course of business to withdraw from the marketing of motor fuel through retail outlets in the relevant geographic market," *id.* § 2802(b)(2)(E).[3]

Congress also sought to ensure that procedural regularity attends the termination process by imposing notification requirements on franchisors. *See* 15 U.S.C. § 2804. The PMPA requires that the franchisor notify the franchisee in writing of the date on which termination will take effect and the reasons for which the franchise is being terminated. *Id.* § 2804(c). That notice must generally be provided at least 90 days before the date termination "takes effect." *Id.* § 2804(a)(2).

The PMPA provides franchisees with a cause of action against a franchisor that fails to comply

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[3] The listed grounds for termination are also grounds for non-renewal. Section 2802(b)(3) sets out additional grounds for non-renewal, including the failure of the parties "to agree to changes or additions to the provisions of the franchise" if the changes or additions "are the result of determinations made by the franchisor in good faith and in the normal course of business." 15 U.S.C. § 2802(b)(3)(A).

with the statute's provisions governing termination or non-renewal. 15 U.S.C. § 2805(a). It requires a court to grant a franchisee a preliminary injunction "to compel continuation or renewal of the franchise relationship" while the court considers the merits of the franchisee's challenge to the franchisor's termination or non-renewal, provided certain specified conditions are met. *Id.* § 2805(b). The franchisee need only establish "sufficiently serious questions going to the merits to make such questions a fair ground for litigation" and that the balance of hardships tips in its favor. *Id.* § 2805(b)(2). The statute authorizes prevailing franchisees to recover actual damages and, in cases involving "willful disregard" of the statute, punitive damages. *Id.* § 2805(d)(1)(A), (B). Finally, the court may award franchisees "reasonable attorney and expert witness fees" unless the franchisee recovers "only nominal damages." *Id.* § 2805(d)(1)(C).

2. Despite the fact that the PMPA by its terms applies only to "termination" or "non-renewal" of the franchise, respondents sued petitioners under the PMPA while continuing to operate their franchises on the theory that petitioners' elimination of a rent reduction program amounted to "constructive termination" of the franchise. Pet. App. 4a. The jury returned a verdict in respondents' favor, awarding them $1.3 million on their constructive termination claim, and the district court

added $1.16 million in attorney's fees and $209,000 in expert witness fees pursuant to the PMPA.[4]

3. The court of appeals affirmed the judgment on the constructive termination claim. Pet. App. 15a-21a. The court rejected petitioners' argument that a service station operator who continues to operate the franchise—that is, continues to use the refiner's trademark, to receive motor fuel, and to lease the premises—cannot claim that it was "terminated" within the meaning of the PMPA. *Id.* at 17a-18a. The court concluded that the PMPA, unlike other laws, does not "require an actual severance of the relationship." *Id.* at 18a. The court reasoned that "requiring a franchisee to go out of business before invoking the protections of the PMPA" would frustrate the "congressional plan." *Id.* Instead, the court recognized a cause of action for wrongful termination under the PMPA where a franchisee alleges that the franchisor breached one of the three statutorily protected contracts—the contract for use of the trademark, motor fuel, or the premises—and that the breach is "such a material change that it effectively ended the lease, even though the [franchisees] continued to operate the business." *Id.*

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[4] The PMPA fee award applied to respondents' constructive termination claim and a constructive non-renewal claim on which they also prevailed. The constructive non-renewal finding was reversed on appeal because, while the court of appeals recognized a claim for constructive termination, it declined to "recognize a claim for nonrenewal under the PMPA where the franchisee has signed and operates under the renewal agreement complained of." Pet. App. 25a.

SUMMARY OF ARGUMENT

Recognizing that petroleum refiners operate and distribute their fuel on a nationwide scale, Congress enacted the PMPA to establish a uniform standard governing the termination and non-renewal of franchise relationships. That objective has not been realized, however, because the federal courts of appeals have issued conflicting decisions on the scope of the cause of action available to remedy wrongful termination. The court of appeals here held that a franchisee may sue a franchisor for wrongful termination under the PMPA even when the franchisor never terminates the franchise or notifies the franchisee of an intent to terminate the franchise. Under the court of appeals' approach, a franchisee need only allege that the franchisor breached a term pertaining to one of the three statutory elements of the franchise (the trademark use authorization, the contract for the supply of motor fuel, or the lease of the premises) and that the breach "effectively ended the lease, even though the [franchisee] continued to operate the business." Pet. App. 18a. In so holding, the court of appeals followed the Fourth Circuit's decision in *Barnes v. Gulf Oil Corp.*, 795 F.2d 358, 359 (4th Cir. 1986), which adopted a similarly expansive view of the cause of action available under the Act for wrongful "termination."

The Sixth Circuit, on the other hand, has held that a franchisor's breach of a statutory element of the franchise must be a total breach such that the franchisee loses use of the trademark, fuel supply, or the premises. *See Clark v. BP Oil Co.*, 137 F.3d 386, 389 (6th Cir. 1998). The Ninth Circuit has similarly

held that the franchisee at a minimum must be forced out of business to state a wrongful termination claim based on a breach of one of the three statutory elements. *See Portland 76 Auto/Truck Plaza, Inc. v. Union Oil Co. of Cal.*, 153 F.3d 938, 942 (9th Cir. 1998). These conflicting decisions merit this Court's review because they defeat one of the key purposes of the Act—to establish a uniform, national standard for the termination of a petroleum franchise.

In addition to the circuit conflict, the court of appeals' decision undermines the congressional goal of a uniform approach to petroleum franchise termination. Under the court of appeals' approach, whether a material breach of the franchise amounts to a constructive termination turns, as it did here, on application of *state* law. The material breach in this case was the breach of an alleged oral promise to continue the rent subsidy, despite a clause in the lease agreement (the "integration clause") that provided that the lease constituted the entire contract and that any amendments to it must be in writing. The court of appeals concluded that under Massachusetts law, "the question of integration is one of fact reserved for the trial judge" (Pet. App. 13a) and that the judge did not commit clear error in "conclud[ing] that the lease was not an integrated agreement." *Id.* at 14a. Thus, the very basis for respondents' claim that they were constructively terminated—that petitioners breached an oral promise that modified the lease—turned on an application of state law.

In seeking to establish a "uniform" (S. Rep. No. 731, at 19) and "federal" standard (*id.* at 15) for

the termination and non-renewal of petroleum franchise relationships, Congress could not possibly have intended to have the very determination of whether a termination occurred turn on application of state law. Under the court of appeals' approach, Congress' goal of uniformity will be utterly frustrated because the viability under the PMPA of a claim for constructive termination will vary from state to state depending on the application of state law.

The court of appeals' decision also misconstrues the scope of the PMPA. The text of the PMPA makes clear that a franchisor must actually terminate a franchise or notify the franchisee of its intent to terminate the franchise before a franchisee has a cognizable claim for wrongful termination. Read together, the provisions defining termination, identifying the permissible grounds for termination, and establishing the notification requirements that must attend termination provide no support for the court of appeals' recognition of a cause of action for alleged material breaches of the franchise that fall short of termination.

The court of appeals justified its departure from the text of the Act on the ground that requiring termination of the franchise would frustrate the "congressional plan" to protect franchisees' investment in their businesses. Pet. App. 18a. Aside from the fact that the text of the statute must control, the court's rationale ignores the remedial scheme Congress established, under which a franchisee threatened with actual termination may obtain a preliminary injunction compelling continuation of the franchise while a court examines

the grounds on which the franchisor intends to effect termination. Moreover, state law causes of action remain available (as they were here) to remedy alleged breaches of contract that do not involve actual termination of the franchise. By allowing franchisees to sue for breach of contract under the PMPA, the court of appeals has broadened the scope of the federal regime well beyond what Congress intended.

REASONS FOR GRANTING THE PETITION

I. Review Is Warranted To Restore The Uniformity Congress Sought To Establish By Enacting The PMPA.

Congress enacted the PMPA to establish a uniform, federal standard to govern the termination and non-renewal of petroleum franchise relationships. A uniform approach is crucial to the effective operation of the national market for motor fuel distribution. As we explain below, a conflict among the federal courts of appeals on the scope of the PMPA's cause of action for wrongful termination has frustrated Congress's intent to establish uniformity. In addition, the court of appeals' decision stands as an obstacle to achieving uniformity because under the approach it adopted, the determination whether a constructive termination under the PMPA has occurred hinges on the application of *state* law.

A. A Uniform Interpretation Of The PMPA Is Of Critical Importance To Franchisors.

In enacting the PMPA, Congress stressed the importance of establishing a "single, uniform set of rules" governing the termination and non-renewal of petroleum franchise relationships, which "permeate a nationwide motor fuel distribution and marketing network." S. Rep. No. 731, at 16. To achieve the goal of uniformity, Congress sought to replace the "uneven patchwork of rules governing franchise relationships which differ from state to state" (*id.* at 19) with a nationwide standard for termination and non-renewal of franchise relationships. Because refiners distribute their fuel nationwide, a uniform regulatory approach permits refiners to operate under a single set of rules, which promotes certainty and efficiency in their franchise relationships. The costs of dealing with unpredictable market conditions are compounded when the legal regime governing the termination and non-renewal of franchise relationships varies from one jurisdiction to another. The higher costs associated with an uncertain and non-uniform legal regime harm both franchisors and franchisees.

B. The Court Of Appeals' Decision Deepens A Circuit Conflict That Prevents The Attainment Of Uniformity.

Congress' goal of uniformity is being frustrated by a conflict among the federal courts of appeals over the scope of the PMPA's termination provisions.[5] In this case, the court of appeals held that respondents had a cause of action under the PMPA for wrongful termination despite the undisputed facts that respondents continued to operate their franchises without interruption and that petitioners neither terminated respondents' franchises nor notified respondents of an intent to terminate their franchises. Pet. App. 15a-21a. Instead, respondents claimed that petitioners breached oral promises to retain a rent subsidy program, a breach that amounted to a "constructive" termination because of the "financial hardship" it allegedly caused them. *Id.* at 21a.

Without attempting to ground the concept of constructive termination in the text of the Act, the court held that "the breach of the statutory element of the franchise"—be it the contract to use the refiner's trademark, the contract for the supply of motor fuel, or the lease of the premises—"does not have to be a total breach." *Id.* Rather, the court concluded that the breach need only constitute "a

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[5] As petitioners note (Pet. 29), the federal circuits have also issued conflicting decisions pertaining to the scope of the PMPA's non-renewal provisions, further undermining the congressional goal of uniformity.

material change that . . . effectively ended the lease, even though the plaintiffs continued to operate the business." *Id.* The court acknowledged that the doctrine of constructive termination typically requires "an actual severance of the relationship" (*id.* at 18a), but reasoned that "requir[ing] an actual abandonment of years of work and investment before we recognize a right of action under the PMPA would be unreasonable." *Id.*

In holding that the PMPA provides a cause of action not only for actual termination of the franchise but also for material changes to one of the three agreements that comprise the franchise, the First Circuit relied on the Fourth Circuit's decision in *Barnes v. Gulf Oil Corp.*, 795 F.2d 358 (4th Cir. 1986). Pet. App. 16a-17a. In *Barnes*, the Fourth Circuit held that a franchisee that continued to operate its franchise but whose fuel costs increased when the franchisor assigned the franchise to a third party stated a claim for constructive termination under the Act. 795 F.2d at 362-363. The Fourth Circuit too failed to ground its holding in the text of the statute, relying instead on "Congress's purpose[]. . . to protect franchisees from overbearing, burdensome conduct by the franchisor during the term of the franchise." *Id.* at 362.

The Sixth Circuit rejected *Barnes* in *Clark v. BP Oil Co.*, 137 F.3d 386 (6th Cir. 1998). Observing that "[t]he PMPA does not exist to redress every breach of an agreement between a gasoline station franchisee and franchisor," *id.* at 391, the court held that a franchisee who continued to operate his franchise but who was charged more for fuel after the franchisor assigned the franchise to a third party

failed to state a claim for termination under the Act, *id.* at 391-392. The court explained that "even if [the franchisee] can establish a breach of the price term [of the franchise], it does not trigger the protections of the PMPA since he still retains use of BP's trademark, use of the Emerald-Mart premises, and continues to receive BP-branded motor fuel." *Id.* at 392.

The Ninth Circuit, like the Sixth Circuit, rejected a franchisee's claim for constructive termination based on an assignment that resulted in a higher charge for motor fuel in *Portland 76 Auto/Truck Plaza, Inc. v. Union Oil Co. of California*, 153 F.3d 938 (9th Cir. 1998). The Ninth Circuit "assume[d] for purposes of discussion, but d[id] not decide, that constructive termination may give rise to a claim under the Act." *Id.* at 948. The court then held that "[f]or the assignment to have amounted to a constructive termination, it would have had to force [the franchisee] out of its business." *Id.*[6]

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[6] The Fifth Circuit "has not recognized a cause of action for 'constructive termination.'" *April Mktg. & Distrib. Corp., Inc. v. Diamond Shamrock Ref. and Mktg. Co.*, 103 F.3d 28, 29 (5th Cir. 1997) (concluding that, to the extent a constructive termination claim is cognizable under the PMPA, the franchisee must establish a "breach [of] the franchise"). In *McGinnis v. Star Enterprise*, 8 F.3d 20, 1993 WL 455587, at *4 (5th Cir. 1993) (unpublished opinion), the Fifth Circuit stated that "[t]he plain meaning of the [PMPA] does not provide for 'constructive termination.'" In *Abrams Shell v. Shell Oil Co.*, 343 F.3d 482 (5th Cir. 2003), the Fifth Circuit characterized the *McGinnis* statement as "*dicta*, and thus persuasive rather than binding" *id.* at 487, and, as in *April Marketing*, did not need to decide whether to recognize a constructive termination claim because (continued...)

Thus, under the current state of the law, respondents have a viable claim for constructive termination under the PMPA in the First and Fourth Circuits, but not in the Sixth or Ninth Circuits. Further review is warranted to resolve the circuit conflict because it denies franchisors and franchisees the uniform standards for termination and non-renewal that Congress sought to establish by enacting the PMPA.

C. The Court Of Appeals' Decision Stands As An Impediment To Uniformity Because Under Its Approach The Viability Of A Cause Of Action Under The PMPA For Constructive Termination Depends On State Law.

The court of appeals' decision undermines the establishment of a uniform federal standard for the termination of petroleum franchises. Under the court's approach, the determination whether a franchisee was constructively terminated within the meaning of the PMPA turns on the application of *state* law. This case is illustrative.

The basis for respondents' constructive termination claim is that petitioners breached an alleged oral promise to maintain a rent subsidy, notwithstanding a clause in the lease agreement providing that the lease constituted the entire contract and that any amendments to it must be in

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the franchisees failed to allege a breach of "the three core components" of the franchise, *id.* at 488.

writing. Applying Massachusetts law, the district court permitted the jury "to consider what the parties said and did concerning the lease" including "actions prior to or contemporaneous with the execution of the written lease." Pet. App. 14a. Because Massachusetts reserves the determination of integration for the trial court as a question of fact, the court of appeals affirmed the district court's "conclu[sion] that the lease was not an integrated agreement" under Massachusetts law. *Id.* Thus, because Massachusetts law (as applied by the federal courts) permitted consideration of petitioners' alleged oral promises in the face of the integration clause, respondents could establish that petitioners committed a material breach of the franchise terms that amounted to a constructive termination under the PMPA. *See* 15 U.S.C. § 2805(c) ("[T]he franchisee shall have the burden of proving the termination of the franchise[.]").

Under the laws of some other states, by contrast, the integration clause in the lease would have been dispositive. Indeed, courts in Ohio and Florida, construing contract language identical to that at issue here, have read the integration clause as foreclosing evidence of alleged oral promises that the rent subsidy would be permanent. *See Casserlie v. Shell Oil Co.*, 2007 WL 1559510, at *7-8 (Ohio Ct. App. May 31, 2007), *appeal accepted for review*, No. 2007-1408, 876 N.E.2d 968 (Ohio Nov. 21, 2007); *Hazara Enterprises, Inc. v. Motiva Enterprises, LLC*, 126 F. Supp. 2d 1365, 1373-1374 (S.D. Fla. 2000). Other jurisdictions similarly give dispositive effect to a clear integration clause. *See, e.g., Tangren Family Trust v. Tangren*, 182 P.3d 326, 331 (Utah 2008)

("[W]e will not allow extrinsic evidence of a separate agreement to be considered on the question of integration in the face of a clear integration clause."); *Air Safety, Inc. v. Teachers Realty Corp.*, 706 N.E.2d. 882, 885 (Ill. 1999) ("[W]here parties formally include an integration clause in their contract, they are explicitly manifesting their intention to protect themselves against misinterpretations which might arise from extrinsic evidence."). In states applying such a rule, respondents could not have alleged constructive termination under the PMPA based on petitioners' breach of alleged oral promises made before or contemporaneous with the execution of the written lease.

By recognizing a cause of action under the PMPA for constructive termination, the court of appeals has allowed state law to determine whether the franchisor has effected a termination under the PMPA. Given Congress' objective to replace the "uneven patchwork of [state] rules" with a "single, uniform set of rules" governing termination of petroleum franchises, S. Rep. No. 731, at 19, that result could not possibly be what Congress intended.

II. Review Is Warranted Because The PMPA Does Not Create A Cause Of Action For Constructive Termination.

The PMPA does not provide a cause of action for constructive termination. In recognizing a cause of action under the PMPA for material changes to the franchise that are harmful to the franchisee, the court of appeals departed from the text of the Act, which creates a cause of action for wrongful termination only in cases where the franchisor has

actually terminated the franchisee or notified the franchisee of its intent to do so.

To begin with, the PMPA defines the term "termination" to include "cancellation." 15 U.S.C. § 2801(17). If Congress had intended the term to cover a much broader range of conduct that is not commonly understood as termination, such as material changes to the franchise terms, it is fair to assume Congress would have said so. Moreover, the provisions governing the grounds for termination and the notification requirements confirm that the PMPA provides a remedy only for actual termination of the franchise.

The PMPA enumerates several grounds on which a franchisor may lawfully terminate the franchise. *See* 15 U.S.C. § 2802(b)(2)(A) (franchisor may terminate franchise if franchisee fails to comply with a reasonable and materially significant franchise term); *id.* § 2802(b)(2)(B) (franchisor may terminate franchise if franchisee does not "exert good faith efforts to carry out the provisions of the franchise"); *id.* § 2802(b)(2)(C) (franchisor may terminate franchise based on occurrence of an event relevant to the franchise relationship and which renders termination reasonable, provided the event occurred while the franchise was still in effect); *id.* § 2802(b)(2)(D) (franchisor may terminate franchise based on written agreement between the franchisor and franchisee to terminate the franchise); *id.* § 2802(b)(2)(E) (franchisor may terminate franchise based on good-faith determination in the normal course of business to withdraw from the marketing of motor fuel through retail outlets in the relevant geographic market). These provisions contemplate

an *actual* termination of the franchise relationship and provide justifications for it.

The PMPA also contains a highly structured notice procedure that presupposes that termination under the Act means actual termination of the franchise, not merely a material change in terms that imposes financial hardship on the franchisee. The PMPA generally requires the franchisor to provide written notice of its intent to terminate the franchise at least "90 days prior to the date on which such termination or nonrenewal takes effect." 15 U.S.C. § 2804(a)(2). If a franchisor actually terminates the franchise without providing the requisite notice, the franchisee may sue under the PMPA for a violation of Section 2802. *See id.* § 2805(a); *id.* § 2802(b)(1)(A). Under the court of appeals' rule that a claim for constructive termination lies where a breach of a franchise term is serious enough to "effectively end[] the lease, even though the plaintiffs continued to operate the business" (Pet. App. 18a), the notice requirement becomes unworkable, because the franchisor will not necessarily know whether or when a change in the franchise terms will "effectively [but not actually] end[] the lease." *Id.* The notice provisions thus operate together with the provisions setting out the legitimate grounds for termination to regulate the *actual* termination of a franchise, not mere changes to the franchise that have an adverse effect on the franchisee.

The PMPA provides a cause of action against franchisors that "fail[] to comply with the

requirements of section 2802." 15 U.S.C. § 2805(a).[7] As discussed above, Section 2802 is concerned exclusively with a decision by a franchisor to sever its relationship with the franchisee either through actual termination or non-renewal of the franchise relationship. Because Section 2805(a) cross-references Section 2802 to define the cause of action, the scope of the remedy in Section 2805(a) for termination or non-renewal is necessarily limited to the scope of the requirements set out in Section 2802. The cause of action that Section 2805(a) creates for failure to comply with the termination provisions thus extends only to the actual termination of a franchise that the franchisee contends was not justified by the grounds enumerated in Section 2802. It does not encompass the claim here that petitioners breached the rent term of the lease. *See Abrams Shell v. Shell Oil Co.*, 216 F. Supp. 2d 634, 639 (S.D. Tex. 2002) (rejecting constructive termination theory under the PMPA "because it conflicts with the PMPA's remedial scheme"), *aff'd*, 343 F.3d 482 (5th Cir. 2003); *cf. Dersch Energies, Inc. v. Shell Oil Co.* 314 F.3d 846, 860 (7th Cir. 2002) ("Because [the franchisee] does not argue that the defendants' alleged violation of [the Act] resulted in the nonrenewal of a lease of retail premises, motor fuel supply contract, or the contract to use the Shell trademark in connection with retail sales, it cannot

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[7] The PMPA also provides a cause of action against a franchisor that fails to comply with the requirements of Section 2803. That Section, which provides special rules for "[t]rial and interim franchises," 15 U.S.C. § 2803, is not at issue here.

demonstrate the nonrenewal of the franchise relationship within the meaning of the PMPA.").

The court of appeals justified its atextual reading of the statute on the ground that "[t]he congressional plan would be frustrated by requiring a franchisee to go out of business before invoking the protections of the PMPA," Pet. App. 18a (internal quotation marks omitted). *See also* Petition for a Writ of Certiorari, *Mac's Shell Service, Inc., et al. v. Shell Oil Prods., Inc., et al.*, No. 08-240, 2008 WL 3919440, at *20 (plaintiffs argue that franchisees should not be "forced to choose between accepting an unlawful and coercive contract in order to stay in business and rejecting it and going out of business in order to preserve a cause of action"). But the PMPA includes provisions that protect franchisees from having to choose between challenging a franchisor's policies or continuing the franchise. Those provisions impose notice requirements on franchisors who intend to terminate the franchise, 15 U.S.C. § 2804, and permit franchisees to file suit and obtain a preliminary injunction compelling "continuation or renewal of the franchise relationship" while the merits of the franchisee's challenge are being litigated. 15 U.S.C. § 2805(b). Congress even relaxed the traditional equitable standards, requiring the granting of a preliminary injunction on a franchisee's showing merely that "there exist sufficiently serious questions going to the merits to make such questions a fair ground for litigation" and that the balance of hardships tips in its favor. *Id.* § 2805(b)(2).

As the Seventh Circuit has explained, the PMPA's notice requirements, together with the

"lenient standard" for injunctive relief, "protect[] franchisees not only from arbitrary and discriminatory termination or nonrenewal, but also from the harmful effects of threatened termination or nonrenewal." *Dersch*, 314 F.3d at 863. That is so because under the Act, "a district court is required to issue an injunction to protect the franchisee's economic interests during the pendency of the case" if the franchisee meets the Act's "lenient standard." *Id.* at 865.

The remedial scheme Congress established thus provides a means for franchisees to protect their franchises while challenging a planned termination or non-renewal without "creat[ing] a federal common law for governing petroleum franchise agreements." *Dersch*, 314 F.3d at 861-862. Moreover, state law causes of action remain available to protect franchisees that allege that the franchisor committed a breach of contract that does not amount to an actual termination of the franchise. Indeed, in this very case, respondents brought state law causes of action that were duplicative of their PMPA claims. *See* Pet. App. 37a (Judgment ¶ 2(v)) ("Because plaintiff's claims under Count II (Violation of the PMPA based on Constructive Termination of the franchise relationship) and under Count V (Breach of the Lease) sought the same damages for loss of the STIP subsidy and lost business value and the jury awarded the same damages, plaintiff is entitled to recover as to those two awards only once."); *id.* at 39a; 40a; 42a; 44a; 46a; 48a; 50a; 52a. The text of the PMPA provides no support for the court of appeals' recognition of a cause of action for alleged material breaches of the franchise that do not result

in termination, a holding that federalizes ordinary breach of contract claims that are the traditional province of state law.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Petitioners,

v

SHELL OIL PRODUCTS COMPANY LLC, *ET AL.*,
Respondents.

SHELL OIL PRODUCTS COMPANY LLC, *ET AL.*,
Petitioners,

v.

MAC'S SHELL SERVICE, INC., *ET AL.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

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UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS (BOSTON)

Case No. 1:00-cv-11295-RWZ

DEMETRIOS TSANIKLIDES, JR., LARRY RUBENSTEIN, ALI JABER, LASCO ENTERPRISES, PAUL SROCZYNSKI, J ENTERPRISES, INC., CHARLES LAGASSE, KACH CORPORATION, NIKOLAS MANOUSARIDIS, THE SHELL DEALERS DEFENSE GROUP,

Plaintiffs,

v.

SHELL OIL PRODUCTS COMPANY AND MOTIVA ENTERPRISES,

Defendants.

RELEVANT DOCKET ENTRIES

DATE	No.	PROCEEDINGS
06/03/2000	1	Complaint filed. Case assigned to Judge: Zobel. Receipt#: 23486 Amount: $150.00. Fee Status: pd (jdj) (Entered: 07/05/2000)
		* * * * *
09/01/2000	5	Answer by Shell Oil Products, Motiva Enterprises to complaint; jury demand, filed. (jdj) (Entered: 09/06/2000)
		* * * * *

DATE	No.	PROCEEDINGS
10/05/2000	7	Motion by Shell Oil Products, Motiva Enterprises to dismiss, filed cs. (jdj) (Entered: 10/05/2000)
10/05/2000	8	Memorandum by Shell Oil Products, Motiva Enterprises in support of [7-1] motion to dismiss, filed. (jdj) (Entered: 10/05/2000)
		* * * * *
11/01/2000	14	Memorandum by Demetrios Tsaniklides Jr., Larry Rubenstein, Ali Jaber, Lasco Enterprises, Paul Sroczynski, J Enterprises, Inc., Charles Lagasse, Kach Corporation, Nikolas Manousaridis, The Shell Dealers in opposition to [7-1] motion to dismiss, filed. (jdj) (Entered: 11/02/2000)
11/07/2000	15	Reply by Shell Oil Products, Motiva Enterprises to response to [7-1] motion to dismiss, filed. (jdj) (Entered: 11/07/2000)
		* * * * *
11/14/2000	16	Judge Rya W. Zobel. Clerk's Notes: re: motion hearing held [7-1] motion to dismiss taken under advisement Court Reporter: McLaughlin (jdj) (Entered: 11/17/2000)
		* * * * *
03/07/2001	18	Judge Rya W. Zobel. Clerk's Notes: re: scheduling conference held: Judge decides a part of motion to dismiss and has

DATE	No.	PROCEEDINGS
		another part to decide and will do that in a memorandum and order. (jdj) (Entered: 03/07/2001)
03/15/2001		Judge Rya W. Zobel. Endorsed Order entered granting in part, denying in part [7-1] motion to dismiss. [EOD Date 3/16/01] cc/cl (jdj) (Entered: 03/16/2001)
		* * * * *
05/01/2001	20	Motion by Demetrios Tsaniklides Jr. for preliminary injunction, filed. (jdj) (Entered: 05/01/2001)
05/01/2001	21	Memorandum by Demetrios Tsaniklides Jr. in support of [20-1] motion for preliminary injunction, filed. (jdj) (Entered: 05/01/2001)
05/01/2001	22	Affidavit of Demetrios Tsaniklides Jr., re: [20-1] motion for preliminary injunction, filed. (jdj) (Entered: 05/01/2001)
05/02/2001	23	Motion by Demetrios Tsaniklides Jr., Larry Rubenstein, Ali Jaber, Lasco Enterprises, Paul Sroczynski, J Enterprises, Inc., Charles Lagasse, Kach Corporation, Nikolas Manousaridis, The Shell Dealers to amend [1-1] complaint, filed. (jdj) (Entered: 05/02/2001)
05/09/2001		Judge Rya W. Zobel. Endorsed Order entered granting [19-1] motion to amend [5-1] answer. cc/cl [EOD Date 5/9/01] (jdj) (Entered: 05/09/2001)

DATE	No.	PROCEEDINGS
05/09/2001	24	STIPULATION by Demetrios Tsaniklides Jr., Larry Rubenstein, Ali Jaber, Lasco Enterprises, Paul Sroczynski, J Enterprises, Inc., Charles Lagasse, Kach Corporation, Nikolas Manousaridis, The Shell Dealers, Shell Oil Products, Motiva Enterprises, Response to motion reset to 5/29/01 for [23-1] motion to amend [1-1] complaint, filed cs. (jdj) (Entered: 05/09/2001)
05/14/2001		Withdrawal of [20-1] motion for preliminary injunction. (lau) (Entered: 05/14/2001)
05/14/2001	25	Plaintiff Demetrios Tsanikilides, Jr.'s withdrawal of motion for Preliminary Injunction, filed. (lau) (Entered: 05/14/2001)
05/16/2001	26	Motion by Shell Oil Products to transfer venue, filed cs. (jdj) (Entered: 05/16/2001)
		* * * * *
05/17/2001	28	Amended Answer to Complaint by Shell Oil Products, Motiva Enterprises, filed cs. Answer amends [5-1] answer; jury demand (jdj) (Entered: 05/17/2001)
05/29/2001	29	Response by Demetrios Tsaniklides Jr., Larry Rubenstein, Ali Jaber, Lasco Enterprises, Paul Sroczynski, J Enterprises, Inc., Charles Lagasse, Kach Corporation, Nikolas Manousaridis, The Shell Dealers in opposition to [26-1] mo-

DATE	No.	PROCEEDINGS
		tion to transfer venue, filed cs. (jdj) (Entered: 05/30/2001)
05/29/2001	30	Memorandum by Demetrios Tsaniklides Jr., Larry Rubenstein, Ali Jaber, Lasco Enterprises, Paul Sroczynski, J Enterprises, Inc., Charles Lagasse, Kach Corporation, Nikolas Manousaridis, The Shell Dealers in opposition to [26-1] motion to transfer venue, filed cs. (jdj) (Entered: 05/30/2001)
05/29/2001	31	Response by Shell Oil Products, Motiva Enterprises in opposition to [23-1] motion to amend [1-1] complaint, filed cs. (jdj) (Entered: 05/30/2001)
		* * * * *
06/12/2001		Judge Rya W. Zobel. Endorsed Order entered granting [26-1] motion to transfer venue. The cases shall be transferred to New Hampshire and Rhode Island [EOD Date 6/12/01] (jdj) (Entered: 06/12/2001)
06/12/2001		Judge Rya W. Zobel. Endorsed Order entered denying [23-1] motion to amend [1-1] complaint. Plaintiffs may file a new case which may be deemed related [EOD Date 6/12/01] cc/cl (jdj) (Entered: 06/12/2001)
		* * * * *
08/10/2001	38	Stipulation of dismissal by Demetrios Tsaniklides Jr. in 1:00-cv-11295, Larry

DATE	No.	PROCEEDINGS
		Rubenstein in 1:00-cv-11295, Ali Jaber in 1:00-cv-11295, Lasco Enterprises in 1:00-cv-11295, Paul Sroczynski in 1:00-cv-11295, J Enterprises, Inc. in 1:00-cv 11295, Charles Lagasse in 1:00-cv-11295, Kach Corporation in 1:00-cv-11295, Nikolas Manousaridis in 1:00-cv-11295, The Shell Dealers in 1:00-cv-11295, Shell Oil Products in 1:00-cv-11295, Motiva Enterprises in 1:00-cv-11295 w/out prejudice, filed cs. (jdj) (Entered: 08/13/2001)
08/10/2001		Case closed. (jdj) (Entered: 08/13/2001)
09/07/2001	39	TRANSCRIPT of Motion to Dismiss Hearing held on November 14, 2000 before Judge Zobel. Court Reporter: Jim McLaughlin. The original transcripts are maintained by the Clerk's Office. Copies may be obtained by contacting the court reporter at 617/320-1173 or the Clerk's Office. (Scalfani, Deborah)

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS (BOSTON)

Case No. 1:01-cv-11300-RWZ

FRANCIS MARCOUX, RONNIE ABOUD, ABRAHAM ABRAHAM, MAHENDRS AMIN, MASSOUD ATALISH, MIKE ATALISH, JORDAN AVRAMIDIS, CHRISS AZAZIAN, RICHARD BAIMA, ED BAKER, STEVE BLACK, DOUGLASS CHAPMAN, JAMES COGGESHALL, MICHAEL CORBETT, PATRICIA DASILVA, ALEX DASILVA, STEVE FALCONE, GEORGE FONTAINE, BILL FONTAINE, CAMILLE FRANCIS, STEVE FRANGIAS, MATTY GAETA, DONALD GAGNON, JOHN GENEROSO, JOHN GOLDEN, KAL HAMZE, ABRAHAM HAMZE, TIBOR HANGYAL, PATRICK HINES, ADAM HIPP, MUHAMMAD IMATIAZ, JAY JON, KAY JON, ABDUL KAFAL, JAQUE KANAAN, GEORGE KANTARGES, JIM KANTAROWSKI, CYNTHIA KAROL, WILLIAM KAUFMAN, JOE KELLEHER, HUSSEIN KOBESSI, MIKE LAMARCHE, RICHARD MELANSON, AKMA[L] MOAWED, JAMES MORAIDIS, SUNNY PATEL, CONSTANTIN PEIDES, RUSSELL PICARD, STEPH[E]N PISARC[Z]YK, SID PRASH[A]D, PAUL RICHARDS, HARVY RUDNICK, FRED SAAD, AZIZ SABA, WALID SAMROUT, EARL STICKNEY, THOMAS SULLIVAN, ROGER THIBAULT, DIMITRIOUS TSANIKILIDES, TOUFIC ATALLAH, DROR DUSDUSHMAN, EARL MCLAUGHLIN, STEPHEN SHEA, JOHN SULLIVAN, WILSON TIBURTINO, J. ENTERPRISE, INC., LASCO ENTERPRISE, INC., NIKOLAS MANOUSARIDIS, LARRY RUBENSEIN, PAUL SROCZYNSKI, JES SERVICE, INC., MAC'S SHELL SERVICE, INC.,

Plaintiffs,

V.

SHELL OIL PRODUCTS COMPANY, MOTIVA ENTERPRISE[S], AND SHELL OIL COMPANY,

Defendants.

RELEVANT DOCKET ENTRIES

DATE	No.	PROCEEDINGS
07/27/2001	1	Complaint filed. Case assigned to Judge: Zobel. Receipt#: 32756 Amount: $150.00. Fee Status: pd (jdj) (Entered: 07/30/2001)
		* * * * *
08/06/2001	4	Amended complaint by Francis Marcoux in 1:01-cv-11300 filed. (Answer due 8/16/01 for Motiva Enterprise[s], for Shell Oil Products). Amended complaint amends [1-1] complaint; (jdj) (Entered: 08/07/2001)
		* * * * *
08/10/2001	8	Amended complaint by Francis Marcoux in 1:01-cv-11300 filed. (Answer due 8/20/01 for Motiva Enterprise[s], for Shell Oil Products). Amended complaint amends [4-1] amended complaint. filed cs (jdj) (Entered: 08/13/2001)
		* * * * *
09/04/2001	10	Answer by Shell Oil Products in 1:01-cv-11300, Motiva Enterprise[s] in 1:01-cv-11300 to complaint; jury demand, filed. (lau) (Entered: 09/04/2001)

DATE	No.	PROCEEDINGS
		* * * * *
01/10/2002	30	Motion by Francis Marcoux et al. in 1:01-cv-11300 to amend [4-1] amended complaint, filed cs. (jdj) (Entered: 01/14/2002)
		* * * * *
01/31/2002	71	Judge Rya W. Zobel. Clerk's Notes: re: motion hearing held granting [25-1] motion for Robert E. Weiner to withdraw as attorney. A letter from Mr. Weiner to all parties not represented by Greenberg Trau[r]ig, indicating that he has filed a motion to w/draw, and that anyone who wishes to proceed w/the case needs to contact new counsel (or Greenberg Trau[r]ig) and have new counsel enter appearance by 2/28/02. case will proceed w/new counsel in the interim. Parties will collaborate on the letter from Mr. Weiner to unrepresented Plaintiffs. Court Reporter: McLaughlin (jdj) (Entered: 02/05/2002)
02/20/2002		Judge Rya W. Zobel. Endorsed Order entered granting [30-1] motion to amend [4-1] amended complaint. cc/cl [EOD Date 2/20/02] (jdj) (Entered: 02/20/2002)
03/01/2002	72	Motion by Francis Marcoux [et al.] to transfer and coordination, filed. (jdj) (Entered: 03/01/2002)
		* * * * *

DATE	No.	PROCEEDINGS
03/15/2002	78	Motion by Shell Oil Products in 1:01-cv-11300 to dismiss, and for judgment on the pleadings, filed cs. (jdj) (Entered: 03/19/2002)
03/15/2002	79	Memorandum by Shell Oil Products in 1:01-cv-11300 in support of [78-1] motion to dismiss, [78-2] [ ] and for judgment on the pleadings, filed cs. (jdj) (Entered: 03/19/2002)
		* * * * *
04/30/2002	82	Judge Rya W. Zobel. Order of Dismissal entered. [EOD Date 4/30/02] cc/cl (jdj) (Entered: 04/30/2002)
05/01/2002	83	Response by Francis Marcoux et al. in 1:01-cv-11300 in opposition to [78-1] motion to dismiss, [78-2] [ ] and for judgment on the pleadings, filed cs. (jdj) (Entered: 05/02/2002)
05/01/2002	84	Memorandum by Francis Marcoux et al. in 1:01-cv-11300 in support of [83-1] opposition response, filed cs. (jdj) (Entered: 05/02/2002)
		* * * * *
05/10/2002	87	Reply by Shell Oil Products in 1:01-cv-11300, Motiva Enterprise[s] in 1:01-cv-11300 [in] response to [78-1] motion to dismiss, [78-2] [ ] and for judgment on the pleadings, filed cs. (jdj) (Entered: 05/10/2002)

DATE	No.	PROCEEDINGS
		* * * * *
05/14/2002	89	Response by Francis Marcoux in 1:01-cv-11300 in opposition to [78-1] motion to dismiss, [78-2] [ ] and for judgment on the pleadings, filed cs. (jdj) (Entered: 05/16/2002)
05/17/2002	90	Transcript of proceedings [ ] held on proceeding date: 5/9/02 before Judge: Zobel. Court Reporter: James McLaughlin (jdj) (Entered: 05/17/2002)
07/03/2002		MDL 1:01-430 transferred to this District for pretrial proceedings. Master Docket assigned as 01-cv-11300 (jdj) (Entered: 07/16/2002)
		* * * * *
07/12/2002		MDL 1:01-514 transferred to this District for pretrial proceedings. Master Docket assigned as 01-11300 (jdj) (Entered: 07/16/2002)
		* * * * *
08/16/2002	93	Supplemental Memorandum by Shell Oil Products in 1:01-cv-11300, Motiva Enterprise[s] in 1:01-cv-11300 re: defendants[']motions to dismiss and for judgment on the pleadings. filed cs. (jdj) (Entered: 08/20/2002)
08/26/2002	94	Supplemental Memorandum by Francis Marcoux in 1:01-cv-11300 re: plaintiffs[']opposition to defendants[']motion to

DATE	No.	PROCEEDINGS
		dismiss and motion for judgment on the pleadings filed. (jdj) (Entered: 08/26/2002)
10/07/2002	95	Judge Rya W. Zobel. Memorandum and Order entered granting in part, denying in part [78-1] motion to dismiss, granting in part, denying in part [78- 2] motion [ ] for judgment on the pleadings. Accordingly, the defendants' motion to dismiss and motion for judgment on the pleadings as to the plaintiffs['] fraud and misrepresentation claim is [a]llowed. As to all other claims, the motions are denied. Entered cc/cl [EOD Date 10/7/02] (lau) (Entered: 10/07/2002)
		* * * * *
10/29/2002	97	Judge Rya W. Zobel. Clerk's Notes: re: scheduling conference held, Ten cases to go forward first, automatic discovery [by] plaintiffs to be complete by the end of November; fact discovery to be complete by mid-[F]ebruary[;] set pretrial conference for 2:00 3/13/03 Court Reporter: (jdj) (Entered: 10/30/2002)
		* * * * *
12/03/2002	107	Motion by (Shell Dealers) Francis Marcoux et al. in 1:01-cv-11300 to amend [1-1] complaint, filed cs. (jdj) (Entered: 12/04/2002)
		* * * * *

DATE	No.	PROCEEDINGS
12/12/2002	111	Judge Rya W. Zobel. Clerk's Notes: re: status conference held, Court is to pick 10 plaintiffs; decide motion to amend complaint[s]; complete discovery re: 10 plaintiffs by 4/30/03; experts by 2/14/03 set pretrial conference for 2:00 5/28/03, set expert discovery due for 5/23/03 (jdj) (Entered: 12/16/2002)
		* * * * *
01/10/2003		Judge Rya W. Zobel. Endorsed Order entered granting [107-1] motion to amend [1-1] complaint. cc/cl [EOD Date 1/13/03] (jdj) Modified on 01/13/2003 (Entered: 01/13/2003)
01/13/2003	119	Judge Rya W. Zobel. Order: The court selects the following plaintiffs for the first trial: J&M Avramidis[ ] (dba Walpole Shell)[;] Three Ks, Inc.; Cynthia Karol (dba Pleasant St Shell)[;] Mac's Shell Service, Inc.; RAM Corp; Akma[l], Inc.; Stephen Pisa[r]czyk; Sid Prashad (dba Madison Shell)[;] Reading Shell & Tire Center; John A. Sullivan. entered. cc/cl [EOD Date 1/13/03] (jdj) (Entered: 01/13/2003)
01/13/2003	120	Second Amended complaint by Francis Marcoux et al. in 1:01-cv-11300 filed. (Answer due 1/23/03 for Motiva Enterprise[s], for Shell Oil Products). Amended complaint amends [4-1] amended complaint. (jdj) Modified on 01/13/2003

DATE	No.	PROCEEDINGS
		(Entered: 01/13/2003)
		* * * * *
04/16/2003	124	Answer by Motiva Enterprise[s] (as to Mac's Shell Service, Inc.) in 1:01-cv-11300 to complaint; jury demand, filed cs. (jdj) Modified on 04/17/2003 (Entered: 04/16/2003)
04/16/2003	125	Answer by Shell Oil Products (as to Mac's Shell Service, Inc.) in 1:01-cv-11300 to complaint; jury demand, filed cs. (jdj) Modified on 04/17/2003 (Entered: 04/16/2003)
04/16/2003	126	Answer by Shell Oil Company (as to Mac's Shell Service, Inc.) in 1:01-cv-11300 to complaint; jury demand, filed cs. (jdj) Modified on 04/17/2003 (Entered: 04/16/2003)
		* * * * *
07/30/2003	149	MOTION for Preliminary Injunction by Abraham Abraham [et al.]. (Document filed under Seal) (Johnson, Jay) (Entered: 07/31/2003)
		* * * * *
07/30/2003	153	SEALED DOCUMENT (Affidavit of counsel in support of plaintiffs['] request for injunctive relief) placed in secure file room. (Johnson, Jay) (Entered: 08/01/2003)

DATE	No.	PROCEEDINGS
07/30/2003	154	AFFIDAVIT of Joseph Kelleher. (Johnson, Jay) (Entered: 08/01/2003)
07/30/2003	155	AFFIDAVIT of Donald Gagnon. (Johnson, Jay) (Entered: 08/01/2003)
07/30/2003	156	AFFIDAVIT of Jose Bento. (Johnson, Jay) (Entered: 08/01/2003)
07/30/2003	157	AFFIDAVIT of John Generoso. (Johnson, Jay) (Entered: 08/01/2003)
07/30/2003	158	AFFIDAVIT of Richard Baima. (Johnson, Jay) (Entered: 08/01/2003)
07/30/2003	159	AFFIDAVIT of James Kantarowski. (Johnson, Jay) (Entered: 08/01/2003)
07/30/2003	160	AFFIDAVIT of Cynthia Karol. (Johnson, Jay) (Entered: 08/01/2003)
07/30/2003	161	AFFIDAVIT of George Fontaine. (Johnson, Jay) (Entered: 08/01/2003)
		* * * * *
10/22/2003	171	Judge Rya W. Zobel: Endorsed ORDER entered denying 149 Motion for Preliminary Injunction, granting 152 (Sealed Motion) plaintiff's motion to compel to the extent defendants have not already responded to plaintiffs['] interrogatories and motion for sanctions is allowed in the amount of plaintiffs' attorneys' fees and costs for preparing the 2 discovery motions; counsel shall file the requisite affidavits, denying 166 Motion for Default Judgment without prej[ud]ice. Defendant's motion for sanctions is denied.

DATE	No.	PROCEEDINGS
		(Urso, Lisa) (Entered: 10/23/2003)
		* * * * *
03/16/2004		Judge Rya W. Zobel: Endorsed ORDER entered denying 186 Motion for TRO. Provided that defendant shall, at the time of delivery of gasoline notify any plaintiff whose inventory is increased by more than 10% over the former cap as a result of the use of the AIM program. Defendant shall also, upon request of any plaintiff, afford the plaintiff a period of 30 days to pay for any such increase. (Urso, Lisa) (Entered: 03/16/2004)
03/16/2004		Judge Rya W. Zobel: Endorsed ORDER entered denying 187 Motion to Amend (Urso, Lisa) (Entered: 03/16/2004)
		* * * * *
04/08/2004	209	MOTION for Relief From or Clarification re Order on Motion for TRO, by Motiva Enterprise, Shell Oil Company, Shell Oil Products Company. (Johnson, Jay) (Entered: 04/09/2004)
		* * * * *
05/03/2004		Judge Rya W. Zobel: endorsed ORDER entered granting 209 Motion for Clarification. Defendant's request to eliminate the notice and 30 day billing procedure is allowed on defendant's representation that it will reinstate the delivery caps.

DATE	No.	PROCEEDINGS
		Defendant[s] agreed to lift them only for limited periods during the winter and emergencies and on prior notice to the dealers. (Urso, Lisa) (Entered: 05/05/2004)
05/04/2004	216	MOTION for Summary Judgment as to plaintiffs Three K's, John A. Sullivan, Reading Shell & Tire Center, Ram Corp. and Stephen Pisarczyk based on their release of claims by Motiva Enterprise[s], Shell Oil Company, Shell Oil Products Company. (Urso, Lisa) (Entered: 05/07/2004)
		* * * * *
05/04/2004	218	MEMORANDUM in Support re 216 MOTION for Summary Judgment filed by Motiva Enterprise[s], Shell Oil Company, Shell Oil Products Company. (Urso, Lisa) (Entered: 05/07/2004)
		* * * * *
05/04/2004	219	AFFIDAVIT of Peter W. Benner re 216 MOTION for Summary Judgment by Motiva Enterprise[s], Shell Oil Company, Shell Oil Products Company. (Urso, Lisa) (Entered: 05/07/2004)
		* * * * *
06/14/2004	224	Opposition re 216 MOTION for Summary Judgment filed by Abraham Abraham [et al.]. (Johnson, Jay) (Entered:

DATE	No.	PROCEEDINGS
		06/15/2004)
06/15/2004	225	MOTION for Summary Judgment by Motiva Enterprise[s], Shell Oil Company, Shell Oil Products Company. (Johnson, Jay) (Entered: 06/15/2004)
06/15/2004	226	MEMORANDUM in Support re 225 MOTION for Summary Judgment filed by Motiva Enterprise[s], Shell Oil Company, Shell Oil Products Company. (Johnson, Jay) (Entered: 06/15/2004)
06/15/2004	227	AFFIDAVIT of Peter W. Benner re 225 MOTION for Summary Judgment. (Johnson, Jay) (Entered: 06/15/2004)
		* * * * *
06/22/2004	229	REPLY to Response to Motion re 216 MOTION for Summary Judgment filed by Shell Oil Company, Shell Oil Products Company. (Spaulding, Cathryn) (Entered: 06/22/2004)
		* * * * *
07/09/2004	241	Response to defendants['] statement of facts pursuant to LR 56.1 by Abraham Abraham [et al.]. (Johnson, Jay) (Entered: 07/13/2004)
07/09/2004	242	Plaintiffs['] Opposition re 225 SECOND MOTION for Summary Judgment filed by Abraham Abraham [et al.]. (Johnson, Jay) (Entered: 07/13/2004)
		* * * * *

DATE	No.	PROCEEDINGS
07/09/2004	244	PLAINTIFFS['] MEMORANDUM in Opposition re 225 MOTION for Summary Judgment filed by Abraham Abraham et al. (Johnson, Jay) (Entered: 07/13/2004)
07/09/2004	245	AFFIDAVIT of Allison K. Jones in Support re 242 Opposition to Defendants['] Motion for summary judgment. (Johnson, Jay) (Entered: 07/13/2004)
07/09/2004	246	AFFIDAVIT of Robert Weiner. (Johnson, Jay) (Entered: 07/13/2004)
		* * * * *
08/10/2004	251	Response to defendants['] statement of facts pursuant to local rule 56.1 by Francis Marcoux et al. (Johnson, Jay) (Entered: 08/10/2004)
08/10/2004	252	AFFIDAVIT of Counsel in Support of Plaintiffs['] Opposition to Defendants['] Motion for Summary Judgment w/attachments. (Johnson, Jay) (Entered: 08/10/2004)
08/10/2004	253	AFFIDAVIT by Steph[e]n Pisarc[z]yk. (Johnson, Jay) (Entered: 08/10/2004)
08/10/2004	254	AFFIDAVIT by Stephen Shea. (Johnson, Jay) (Entered: 08/10/2004)
08/10/2004	255	AFFIDAVIT by John Sullivan. (Johnson, Jay) (Entered: 08/10/2004)
08/10/2004	256	AFFIDAVIT by Richard Melanson. (Johnson, Jay) (Entered: 08/10/2004)

DATE	No.	PROCEEDINGS
08/10/2004	257	AFFIDAVIT by Abdul Kafal. (Johnson, Jay) (Entered: 08/10/2004)
08/10/2004	258	AFFIDAVIT of Brian Gorin. (Johnson, Jay) (Entered: 08/10/2004)
08/10/2004	259	AFFIDAVIT of Fred Bucklin. (Johnson, Jay) (Entered: 08/10/2004)
08/10/2004	260	AFFIDAVIT of Jeffrey Bernard. (Johnson, Jay) (Entered: 08/10/2004)
08/11/2004	261	Judge Rya W. Zobel: ORDER on Application for Sanctions entered. Fees in the amount of $7,300 and costs in the amount of $306.58. (Urso, Lisa) (Entered: 08/11/2004)
08/12/2004	262	MOTION for Summary Judgment on all claims by Motiva Enterprise[s], Shell Oil Company, Shell Oil Products Company. (Johnson, Jay) (Entered: 08/12/2004)
08/12/2004	263	MEMORANDUM in Support re 262 MOTION for Summary Judgment filed by Motiva Enterprise[s], Shell Oil Company, Shell Oil Products Company. (Johnson, Jay) (Entered: 08/12/2004)
08/12/2004	264	NOTICE of ADDENDA by Motiva Enterprise[s], Shell Oil Company, Shell Oil Products Company re 262 MOTION for Summary Judgment (Johnson, Jay) (Entered: 08/12/2004)

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DATE	No.	PROCEEDINGS
09/14/2004	267	Opposition re 262 THIRD MOTION for Summary Judgment filed by Francis Marcoux. (Johnson, Jay) (Entered: 09/14/2004)
		* * * * *
09/14/2004	269	Response to Defendants['] Statement of Facts Pursuant to LR 56.1 by Francis Marcoux et al. (Johnson, Jay) (Entered: 09/14/2004)
09/14/2004	270	AFFIDAVIT of John F. Farraher Jr. re 267 Opposition to Motion for summary judgment. (Johnson, Jay) (Entered: 09/14/2004)
09/14/2004	271	AFFIDAVIT of Robert Weiner re 267 Opposition to Motion for summary judgment. (Johnson, Jay) (Entered: 09/14/2004)
09/14/2004	272	AFFIDAVIT re 267 Opposition to Motion for summary judgment by Jordan Avramidis. (Johnson, Jay) (Entered: 09/14/2004)
09/14/2004	273	SUPPLEMENTAL AFFIDAVIT by Jordan Avramidis. (Johnson, Jay) (Entered: 09/14/2004)
09/14/2004	274	AFFIDAVIT by Abdul Kafal. (Johnson, Jay) (Entered: 09/14/2004)
09/14/2004	275	AFFIDAVIT by Cynthia Karol. (Johnson, Jay) (Entered: 09/14/2004)
09/14/2004	276	AFFIDAVIT by Richard Melanson. (Johnson, Jay) (Entered: 09/14/2004)

DATE	No.	PROCEEDINGS
09/14/2004	277	AFFIDAVIT by Francis Marcoux. (Johnson, Jay) (Entered: 09/14/2004)
09/14/2004	278	AFFIDAVIT by Akma[l] Moawed. (Johnson, Jay) (Entered: 09/14/2004)
09/14/2004	279	AFFIDAVIT by Steph[e]n Pisarc[z]yk. (Johnson, Jay) (Entered: 09/14/2004)
09/14/2004	280	AFFIDAVIT by Sid Prash[a]d. (Johnson, Jay) (Entered: 09/14/2004)
09/14/2004	281	AFFIDAVIT by Stephen Shea. (Johnson, Jay) (Entered: 09/14/2004)
09/14/2004	282	AFFIDAVIT by John Sullivan. (Johnson, Jay) (Entered: 09/14/2004)
09/14/2004	283	MEMORANDUM in Opposition re 262 THIRD MOTION for Summary Judgment filed by Francis Marcoux. (Johnson, Jay) (Entered: 09/14/2004)
		* * * * *
10/25/2004	293	Judge Rya W. Zobel: Memorandum of Decision entered denying 216 Motion for Summary Judgment, denying 225 Motion for Summary Judgment, granting 262 Motion for Summary Judgment as to Three K's and Stephen Pisarczyk. Entered (Urso, Lisa) (Entered: 10/26/2004)
		* * * * *
10/28/2004	296	EMERGENCY MOTION for Limited Reconsideration of the entry of summary judgment against Plaintiff Ste-

DATE	No.	PROCEEDINGS
		phen Pisarczyk by Francis Marcoux. (Johnson, Jay) (Entered: 10/29/2004)
10/28/2004	297	EMERGENCY MOTION for Reconsideration of Court[']s 10/25/04 Memorandum and Decision w/respect to defendants[']] Motions for Summary Judgment by Motiva Enterprise[s], Shell Oil Company, Shell Oil Products Company. (Johnson, Jay) (Entered: 10/29/2004)
		* * * * *
11/02/2004	303	Opposition re 297 MOTION for Reconsideration filed by Shell Oil Company. (Attachments: #1 Affidavit) (Spaulding, Cathryn) (Entered: 11/02/2004)
11/03/2004		[E]lectronic Clerk's Notes for proceedings held before Judge Rya W. Zobel: Initial Pretrial Conference held on 11/3/2004. Jury Trial reset for 11/15/2004 09:00 AM in Courtroom 12 before Judge Rya W. Zobel. Pretrial Conference set for 11/12/2004 09:00 AM before Judge Rya W. Zobel. Parties are engaging in mediation; (Urso, Lisa) (Entered: 11/03/2004)
		* * * * *
11/12/2004		[E]lectronic Clerk's Notes for proceedings held before Judge Rya W. Zobel : Final Pretrial Conference held on 11/12/2004. 9 jurors; (Court Reporter Romanow.) (Urso, Lisa) (Entered:

DATE	No.	PROCEEDINGS
		11/15/2004)
		* * * * *
11/15/2004		Electronic Clerk's Notes for proceedings held before Judge Rya W. Zobel: Jury Selection held on 11/15/2004. Jury of nine selected and sworn. Plaintiff's opening, defendant's opening. (Court Reporter Romanow.) (Hurley, Virginia) (Entered: 11/29/2004)
11/16/2004		Electronic Clerk's Notes for proceedings held before Judge Rya W. Zobel: Jury Trial day two held on 11/16/2004; plaintiff witness #1 Cindy Karol, cross, redirect, recross; witness #2 John Sullivan (Court Reporter Romanow.) (Hurley, Virginia) (Entered: 12/01/2004)
		* * * * *
11/17/2004		Electronic Clerk's Notes for proceedings held before Judge Rya W. Zobel: Jury Trial day 3 held on 11/17/2004; continued of John Sullivan; witness #3 Akmal Moawed; d[ir]ect; (Court Reporter Shelley.) (Urso, Lisa) (Entered: 12/01/2004)
11/18/2004		Electronic Clerk's Notes for proceedings held before Judge Rya W. Zobel: Jury Trial Day Four held on 11/18/2004; continued [c]ross of Akmal Moawed; redirect; re-cros[s]; video deposition of Michael Hanl[e]y; video deposition of

DATE	No.	PROCEEDINGS
		Laura Styslinger; (Court Reporter Shelley.) (Urso, Lisa) (Entered: 12/01/2004)
11/19/2004	307	TRANSCRIPT of Jury Trial Day Three held on November 17, 2004 before Judge Zobel. Court Reporter: Shelly M. Killian. * * * (Entered: 11/19/2004)
11/19/2004	308	TRANSCRIPT of Jury Trial Day Four held on November 18, 2004 before Judge Zobel. Court Reporter: Shelly M. Killian. * * * (Entered: 11/19/2004)
11/19/2004		Electronic Clerk's Notes for proceedings held before Judge Rya W. Zobel: Jury Trial Day 5 held on 11/19/2004; plaintiff witness #6 Greg McCombs; direct; cross; re-direct; plaintiff witness #7 Frances Marcoux; direct; cross; (Court Reporter Shelley.) (Urso, Lisa) (Entered: 12/01/2004)
11/22/2004	309	TRANSCRIPT of Jury Trial Day Five held on November 19, 2004 before Judge Zobel. Court Reporter: Shelly M. Killian. * * * (Entered: 11/22/2004)
		* * * * *
11/22/2004		Electronic Clerk's Notes for proceedings held before Judge Rya W. Zobel: Jury Trial Day Six held on 11/22/2004; continued cross of Frances Marcoux (#7); video deposition of Eugen[ ]e John Goll; witness #9 Richard Melanson; direct; cross; (Court Reporter Shelley.) (Urso, Lisa) (Entered: 12/01/2004)

DATE	No.	PROCEEDINGS
		* * * * *
11/23/2004		Electronic Clerk's Notes for proceedings held before Judge Rya W. Zobel: Jury Trial Day Seven held on 11/23/2004; continued cross of Melanson; re-direct; re-cross; plaintiff's witness #10 Sid Prash[a]d; direct; cross; re-direct; witness #11 Jordanis Avramidis; direct; cross; re-direct; re-cross; (Court Reporter Shelley.) (Urso, Lisa) (Entered: 12/01/2004)
11/24/2004		Electronic Clerk's Notes for proceedings held before Judge Rya W. Zobel: Jury Trial Day Eight held on 11/24/2004; plaintiff's expert Frank R. Zito; direct; cross; expert Fred W. Bucklin; direct; cross; expert witness Jeffrey Bernard; direct; cross; (Court Reporter Shelley.) (Urso, Lisa) (Entered: 12/01 /2004)
11/29/2004	310	TRANSCRIPT of Jury Trial Day Seven held on November 23, 2004 before Judge Zobel. Court Reporter: Debra M. Joyce. * * * (Entered: 11/29/2004)
11/29/2004	311	TRANSCRIPT of Jury Trial Day Eight held on November 24, 2004 before Judge Zobel. Court Reporter: Debra M. Joyce. * * * (Entered: 11/29/2004)
11/29/2004	314	MOTION for special verdict by Plaintiff Lessee-Dealers Francis Marcoux et al. (Johnson, Jay) (Entered: 11/30/2004)

DATE	No.	PROCEEDINGS
11/29/2004		Electronic Clerk's Notes for proceedings held before Judge Rya W. Zobel: Jury Trial Day Nine held on 11/29/2004; e[x]pert witness Bernard continued cross; plaintiff witness #15 Stephen Pisarczyk; direct; cross; redirect; recross; video deposition of Hanson; witness #17 direct; cross; (Court Reporter [ ]Shelley.) (Urso, Lisa) (Entered: 12/01/2004)
11/30/2004	315	TRANSCRIPT of Jury Trial Day One held on November 15, 2004 before Judge Zobel. Court Reporter: Richard H. Romanow. * * * (Entered: 11/30/2004)
11/30/2004	316	TRANSCRIPT of Jury Trial Day Two held on November 16, 2004 before Judge Zobel. Court Reporter: Richard H. Romanow. * * * (Entered: 11/30/2004)
11/30/2004	317	TRANSCRIPT of Jury Trial Day Nine held on November 29, 2004 before Judge Zobel. Court Reporter: Shelly M. Killian. * * * (Entered: 11/30/2004)
11/30/2004		Electronic Clerk's Notes for proceedings held before Judge Rya W. Zobel: Jury Trial Day Ten held on 11/30/2004; continued cross of Brian Gorin; redirect; re-cross; defendant witness #1 Professor Joseph P. Kalt; direct; cross; (Court Reporter Shelley.) (Urso, Lisa) (Entered: 12/01/2004)

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DATE	No.	PROCEEDINGS
12/01/2004		Electronic Clerk's Notes for proceedings held before Judge Rya W. Zobel: Jury Trial Day Eleven held on 12/1/2004; con[t]inued cross of Prof. Kalt; re-direct; re-cross; defendant witness #2 [ ]Alyn Hanson; direct; cross; witness #3 Robert Morris; direct; cross; re-direct; re-cross; witness #4 Michael T. Hanley; direct; (Court Reporter Shelley.) (Urso, Lisa) (Entered: 12/01/2004)
		* * * * *
12/02/2004	322	MOTION for Judgment as a Matter of Law by Motiva Enterprise[s], Shell Oil Company, Shell Oil Products Company. (Johnson, Jay) (Entered: 12/03/2004)
12/02/2004	323	MEMORANDUM in Support re 322 MOTION for Judgment as a Matter of Law filed by Motiva Enterprise[s], Shell Oil Company, Shell Oil Products Company. (Johnson, Jay) (Entered: 12/03/2004)
12/02/2004		[E]lectronic Clerk's Notes for proceedings held before Judge Rya W. Zobel: Jury Trial day 12 held on 12/2/2004. Defendant witness #4 Michael Hanley; direct contin[u]ed; cross; redirect; recross; witness #5 direct; cross; redirect; recross; witness #6 Lee Fry; direct; cross; redirect; recross; witness #7 Timothy Brooks; direct; cross; redirect; recross; witness #8 Dennis Nielsen; direct;

DATE	No.	PROCEEDINGS
		cross; witness #7 (expert) John Umbeck; direct; (Court Reporter Shelley.) (Urso, Lisa) (Entered: 12/06/2004)
		* * * * *
12/03/2004	321	TRANSCRIPT of Jury Trial Day Six held on November 22, 2004 before Judge Zobel. Court Reporter: Valerie A. O'Hara. * * * (Entered: 12/03/2004)
12/03/2004		[E]lectronic Clerk's Notes for proceedings held before Judge Rya W. Zobel: Jury Trial Day 13 held on 12/3/2004. [D]efendant witness #9 Umbeck; continued; cross; redirect; recross; witness #10 Webster Collins; direct; cross; redirect; re[ ]cross; witness #11 Howard Gordon; direct; cross; redirect; recross; witness #12 Steve Bradley; direct; cross; redirect; recross; (Court Reporter Shelley.) (Urso, Lisa) (Entered: 12/06/2004)
12/03/2004	325	Plaintiff Lessee-Dealers Proposed Jury Instructions by Francis Marcoux et al. (Johnson, Jay) Modified on 12/8/2004 (Johnson, Jay). (Entered: 12/07/2004)
12/03/2004	326	AMENDED DOCUMENT by Francis Marcoux et al. (Special Verdict). (Johnson, Jay) (Entered: 12/07/2004)
12/03/2004	350	MOTION for special verdict by Shell Oil Products Company, Motiva Enterprise[s], Shell Oil Company. (filed in open court 12/3/04) (Johnson, Jay) (En-

DATE	No.	PROCEEDINGS
		tered: 02/16/2005)
12/03/2004	351	MOTION for jury instructions by Shell Oil Products Company, Motiva Enterprise[s], Shell Oil Company. (Johnson, Jay) (Entered: 02/16/2005)
12/06/2004	324	TRANSCRIPT of Jury Trial Day Twelve held on December 2, 2004 before Judge Zobel. Court Reporter: Lee A. Marzilli. * * * (Entered: 12/06/2004)
12/06/2004	329	SUPPLEMENTAL MOTION for Special Verdict by Motiva Enterprise[s], Shell Oil Company, Shell Oil Products Company. (Johnson, Jay) (Entered: 12/07/2004)
		* * * * *
12/06/2004	332	Proposed Supplemental and Amended Jury Instructions by Motiva Enterprise[s], Shell Oil Company, Shell Oil Products Company. (Johnson, Jay) (Entered: 12/07/2004)
12/07/2004	333	Trial Exhibit List by Motiva Enterprise[s], Shell Oil Company, Shell Oil Products Company. (Johnson, Jay) (Entered: 12/08/2004)
		* * * * *
12/08/2004	335	SPECIAL JURY VERDICT in favor of plaintiffs against defendant. (Urso, Lisa) Modified on 12/13/2004 (Johnson, Jay). (Entered: 12/10/2004)

DATE	No.	PROCEEDINGS
12/14/2004	336	TRANSCRIPT of Jury Trial Day Fifteen held on December 8, 2004 before Judge Zobel. Court Reporter: Shelly M. Killian. * * * (Entered: 12/14/2004)
01/07/2005	341	MOTION for Permanent Injunction by Francis Marcoux et al. (Johnson, Jay) (Entered: 01/11/2005)
01/07/2005	343	Proposed Findings of Fact and Rulings of Law on Count 3 by Francis Marcoux et al. (Attachments: #1 part 2) (Johnson, Jay) (Entered: 01/11/2005)
01/10/2005	337	TRANSCRIPT of Jury Trial Day Eleven held on December 1, 2004 before Judge Zobel. Court Reporter: Shelly M. Killian. * * * (Entered: 01/10/2005)
01/10/2005	338	TRANSCRIPT of Jury Trial Day Thirteen held on December 3, 2004 before Judge Zobel. Court Reporter: Shelly M. Killian. * * * (Entered: 01/10/2005)
01/10/2005	339	TRANSCRIPT of Jury Trial Day Fourteen held on December 7, 2004 before Judge Zobel. Court Reporter: Shelly M. Killian. * * * (Entered: 01/10/2005)
01/10/2005	340	EXCERPT TRANSCRIPT of Jury Trial Day Fourteen (Jury Instructions) held on December 7, 2004 before Judge Zobel. Court Reporter: Shelly M. Killian. * * * (Entered: 01/10/2005)
01/10/2005	342	MOTION for an award of punitive damages arising from defendants['] willful disregard of the PMPA by Francis Mar-

DATE	No.	PROCEEDINGS
		coux et al. (Johnson, Jay) (Entered: 01/11/2005)
		* * * * *
01/28/2005	345	STIPULATION of Dismissal by Stephen Shea and Reading Shell. (Johnson, Jay) (Entered: 02/01/2005)
02/07/2005	346	Proposed Findings of Fact and Rulings of Law by Shell Oil Products Company, Motiva Enterprise[s], Shell Oil Company. (Attachments: #1) (Johnson, Jay) Additional attachment(s) added on 2/9/2005 (Johnson, Jay). Additional attachment(s) added on 2/9/2005 (Johnson, Jay). (Entered: 02/08/2005)
02/07/2005	347	MEMORANDUM in Opposition re 341 MOTION for Permanent Injunction filed by Shell Oil Products Company, Motiva Enterprise[s], Shell Oil Company. (Johnson, Jay) (Entered: 02/08/2005)
02/07/2005	348	MEMORANDUM in Opposition re 342 MOTION [for] an award of punitive damages arising from defendants['] willful disregard of the PMPA filed by Shell Oil Products Company, Motiva Enterprise[s], Shell Oil Company. (Johnson, Jay) (Entered: 02/08/2005)
02/07/2005	349	Response by Shell Oil Products Company, Motiva Enterprise[s], Shell Oil Company to 343 Proposed Findings of Fact. (Attachments: #1) (Johnson, Jay)

DATE	No.	PROCEEDINGS
		(Entered: 02/08/2005)
		* * * * *
02/28/2005	352	MOTION for Judgment as a Matter of Law, or in the alternative MOTION for New Trial by Shell Oil Products Company, Motiva Enterprise[s], Shell Oil Company. (Johnson, Jay) (Entered: 03/02/2005)
02/28/2005	353	MOTION for Leave to File Memorandum in Excess of 20 pages by Shell Oil Products Company, Motiva Enterprise[s], Shell Oil Company. (Johnson, Jay) (Entered: 03/02/2005)
		* * * * *
03/04/2005	355	REPLY to Response to Motion re 341 MOTION for Permanent Injunction filed by Jordan Avramidis. (Urso, Lisa) (Entered: 03/04/2005)
		* * * * *
04/05/2005	361	(Assented to) MOTION for Leave to File Brief in Excess of 20 Pages by Jordan Avramidis [et al.]. (Attachments: #1 Memorandum in Opposition to Defendants['] Motion for Judgment as a Matter of Law or [i]n the Alternative for a New Trial) (Johnson, Jay) (Entered: 04/06/2005)
		* * * * *

DATE	No.	PROCEEDINGS
04/28/2005	364	REPLY to Response to Motion re 352 MOTION for Judgment as a Matter of Law MOTION for New Trial filed by Shell Oil Products Company, Motiva Enterprise[s], Shell Oil Company. (Attachments: #1 Exhibit 1) (Sanson, Paul) (Entered: 04/28/2005)
04/28/2005	365	Assented to MOTION for Leave to File *Reply to Plaintiffs' Opposition to Defendants' Motion for Judgment as a Matter of Law or, in the Alternative, For a New Trial* by Shell Oil Products Company, Motiva Enterprise[s], Shell Oil Company. (Sanson, Paul) (Entered: 04/28/2005)
		* * * * *
09/19/2005	367	Judge Rya W. Zobel: ORDER entered denying 296 Motion for Reconsideration, denying 297 Motion for Reconsideration, denying 298 Motion in Limine, denying 299 Motion in Limine, denying 302 Motion in Limine, granting 314 Motion, denying 322 Motion for Judgment as a Matter of Law, granting 329 Motion, denying 341 Motion for Permanent Injunction, denying 342 Motion, granting 350 Motion, granting in part and denying in part 351 Motion, denying 352 Motion for Judgment as a Matter of Law, denying 352 Motion for New Trial, granting 353 Motion for Leave to File, granting 361 Motion for Leave to File, granting 365

DATE	No.	PROCEEDINGS
		Motion for Leave to File (Urso, Lisa) (Entered: 09/19/2005)
		* * * * *
10/17/2005	369	NOTICE OF APPEAL as to 367 Order on Motion for Reconsideration, Order on Motion in Limine, Order on Motion for Miscellaneous Relief, Order on Motion for Judgment as a Matter of Law, Order on Motion for Permanent Injunction, Order on Motion for New Trial, Order on Motion for Leave to File, by Shell Oil Products Company, Motiva Enterprise[s], Shell Oil Company. $255 * * * (Entered: 10/19/2005)
		* * * * *
10/18/2005	371	NOTICE OF APPEAL as to 367 Order on Motion for Reconsideration, Order on Motion in Limine, Order on Motion for Miscellaneous Relief, Order on Motion for Judgment as a Matter of Law, Order on Motion for Permanent Injunction, Order on Motion for New Trial, Order on Motion for Leave to File, by Mac's Shell Service, Inc., Jordan Avramidis, Cynthia Karol, Steph[e]n Pisarc[z]yk. $255 * * * (Entered: 10/21/2005)
		* * * * *
12/05/2005	377	USCA Case Number 05-2770 for 371 Notice of Appeal, filed by Jordan Avramidis, Cynthia Karol, Steph[e]n Pis-

DATE	No.	PROCEEDINGS
		arc[z]yk, Mac's Shell Service, Inc., (Ramos, Jeanette) (Entered: 12/05/2005)
12/07/2005	378	USCA Case Number 05-2771 for 369 Notice of Appeal, filed by Shell Oil Company, Shell Oil Products Company, Motiva Enterprise[s]. (Ramos, Jeanette) (Entered: 12/07/2005)
		* * * * *
01/25/2006	382	Joint MOTION for Entry of separate Judgment under Rule 54(b). (Urso, Lisa) (Entered: 01/25/2006)
02/07/2006	383	TRANSCRIPT of Jury Trial Day Ten held on November 30, 2004 before Judge Zobel. Court Reporter: Shelly M. Killian. * * * (Entered: 02/07/2006)
02/07/2006	384	TRANSCRIPT of Charge Conference held on December 6, 2004 before Judge Zobel. Court Reporter: Shelly M. Killian. * * * (Entered: 02/07/2006)
02/07/2006	385	TRANSCRIPT of Motion Hearing held on May 5, 2005 before Judge Zobel. Court Reporter: Shelly M. Killian. * * * (Entered: 02/07/2006)
		* * * * *
02/16/2006	387	MOTION for Attorney Fees, *Expert Witness Fees, And Costs Pursuant to 15 USC 2805(d)(1)(C) and Fed. R. Civ. P. 54(d)* by Jordan Avramidis, Mac's Shell Service, Inc., Cynthia Karol, Richard

DATE	No.	PROCEEDINGS
		Melanson, Akma[l] Moawed, Steph[e]n Pisarc[z]yk, Sid Prash[a]d, John Sullivan. (Attachments: * * *) (Farraher, John) (Entered: 02/16/2006)
		* * * * *
08/31/2006	397	Judge Rya W. Zobel: ORDER entered granting 382 Motion for Entry of Judgment under Rule 54(b). The parties shall submit a joint proposed judgment that incorporate[s] the court's rulings. (Urso, Lisa) (Entered: 09/01/2006)
10/26/2006	398	NOTICE by Jordan Avramidis, Shell Oil Products Company, Mac's Shell Service, Inc., Abdul Kafal, Motiva Enterprise[s], Cynthia Karol, Richard Melanson, Akma[l] Moawed, Steph[e]n Pisarc[z]yk, Sid Prash[a]d, John Sullivan, Shell Oil Company re 397 Order on Motion for Entry of Judgment under Rule 54(b) *re: Filing of Revised Proposed Final Judgment* (Attachments: #1 Revised Proposed Judgment and related Exhibit A) (Sanson, Paul) (Entered: 10/26/2006)
		* * * * *
10/27/2006	399	Judge Rya W. Zobel: ORDER entered. JUDGMENT entered. (Urso, Lisa) Additional attachment(s) added on 10/30/2006 (Urso, Lisa). Additional attachment(s) added on 10/31/2006 (Urso, Lisa). (Entered: 10/27/2006)

DATE	No.	PROCEEDINGS
11/02/2006	401	AMENDED DOCUMENT by Jordan Avramidis, Mac's Shell Service, Inc., Abdul Kafal, Cynthia Karol, Richard Melanson, Akma[l] Moawed, Steph[e]n Pisarc[z]yk, Sid Prash[a]d, John Sullivan. *Amended Notice of Appeal.* (Farraher, John) (Entered: 11/02/2006)
11/10/2006	402	Subsequent NOTICE OF APPEAL by Shell Oil Products Company, Motiva Enterprise[s], Shell Oil Company: *DEFENDANTS' AMENDED NOTICE OF APPEAL.* Filing fee $455. Appeal Record due by 11/30/2006. (Sanson, Paul) (Entered: 11/10/2006)
		* * * * *
12/26/2006	406	Judge Rya W. Zobel: ORDER entered allowing in part 387 Motion for Attorney Fees. Status conference set for January 18, 2007, at 3:00 p.m. (Diblasi, Lily) Modified on 12/27/2006 (Johnson, Jay). (Entered: 12/26/2006)
		* * * * *
01/09/2007	407	SECOND AMENDED NOTICE OF APPEAL by Jordan Avramidis, Mac's Shell Service, Inc., Abdul Kafal, Cynthia Karol, Richard Melanson, Akma[l] Moawed, Steph[e]n Pisarc[z]yk, John Sullivan. (Farraher, John) Modified on 1/10/2007 (Johnson, Jay). (Entered: 01/09/2007)

DATE	No.	PROCEEDINGS
01/16/2007	408	AMENDED NOTICE OF APPEAL by Shell Oil Products Company, Motiva Enterprise[s], Shell Oil Company. Amendment to 369 Notice of Appeal, 402 Subsequent Notice of Appeal: *Defendants' Second Amended Notice of Appeal.* (Sanson, Paul) Modified on 1/18/2007 (Johnson, Jay). (Entered: 01/16/2007)
		* * * * *
06/21/2007	411	MANDATE of USCA as to 371 Notice of Appeal, filed by Mac's Shell Service, Inc., Cynthia Karol, Jordan Avramidis, Steph[e]n Pisarc[z]yk. Upon consideration of the parties' stipulation of dismissal, it is hereby ordered that this appeal be voluntarily dismissed pursuant to Fed. R. App. P. 42(b) with each party to bear its own costs. This dismissal does not affect No. 05-2771, which remains open. Mandate issued in the USCA 6/21/2007 (Ramos, Jeanette) (Entered: 06/21/2007)
		* * * * *
04/21/2008	413	USCA Judgment as to 402 Subsequent Notice of Appeal filed by Shell Oil Products Company, Shell Oil Company, Motiva Enterprise[s], 369 Notice of Appeal, filed by Shell Oil Products Company, Shell Oil Company, Motiva Enterprise[s]. Upon considerati[o]n whereof, it is now here ordered, adjudged and decreed

DATE	No.	PROCEEDINGS
		as follows: The judgment of the district court on the state contract claims, the unreasonable gasoline pricing claims, and the constructive termination claims is affirmed. The judgment on the constructive nonrenewal claims is reversed. The jury award of attorney's fees and costs is vacated and remanded for reconsideration in light of our mixed disposition of the claims under the Petroleum Marketing [Practices Act]. Costs on appeal are awarded to the appellees. Judgment issued in the USCA 4/18/2008 (Ramos, Jeanette) (Entered: 04/21/2008)
04/21/2008	414	OPINION of USCA. Opinion issued in the USCA 4/18/2008 (Attachments: #1 part 2) (Ramos, Jeanette) (Entered: 04/21/2008)
		* * * * *
06/09/2008	415	MANDATE of USCA as to 402 Subsequent Notice of Appeal filed by Shell Oil Products Company, Shell Oil Company, Motiva Enterprise[s], 369 Notice of Appeal, filed by Shell Oil Products Company, Shell Oil Company, Motiva Enterprise. Mandate issued in the USCA 6/6/2008 (Ramos, Jeanette) (Entered: 06/09/2008)
		* * * * *

DATE	No.	PROCEEDINGS
06/20/2008	418	Judge Rya W. Zobel: ORDER entered. (Jury Trial set for 11/17-11/21 @09:00 AM in Courtroom 12 before Judge Rya W. Zobel; 12/8-12/12; 12/15-12/19; Pre-trial Conference set for 11/5/2008 02:00 PM in Courtroom 12 before Judge Rya W. Zobel.) (Urso, Lisa) (Entered: 06/20/2008)
		* * * * *
08/07/2008	425	Judge Rya W. Zobel: ORDER entered. The discovery and trials will proceed on the basis of the First Circuit ruling. (Urso, Lisa) (Entered: 08/07/2008)
		* * * * *
10/27/2008		Electronic Clerk's Notes for proceedings held before Judge Rya W. Zobel: Telephone Conference held on 10/27/2008. Case has settled; defendant to file a proposed show cause hearing for Abe Abrahams for 11/19/08 at 2:00 p.m.; motion to be filed for Joe Kelleher to dismiss; 1st group not a party to the settlement; sealed settlement; Court to get back to counsel re: NH & RI cases; (Attorneys present: Farraher & Sanson) (Urso, Lisa) (Entered: 10/27/2008)
10/27/2008	468	Judge Rya W. Zobel: ORDER entered. Accordingly, the court will notify the Clerk of the Panel of the filing of the parties['] stipulation of dismissal and

DATE	No.	PROCEEDINGS
		thereby resolve the transfer order. (Urso, Lisa) (Entered: 10/27/2008)
		* * * * *
11/13/2008	471	STIPULATION of Dismissal *(STIPULATION OF PARTIAL DISMISSAL IN C.A. No. 01-11300)* by Chriss Azazian, Richard Baima, Ed Baker, Steve Black, Douglass Chapman, James Coggeshall, Michael Corbett, Patricia Dasilva, Alex Dasilva, Francis Marcoux, Steve Falcone, George Fontaine, Bill Fontaine, Camille Francis, Steve Frangias, Matty Gaeta, Donald Gagnon, John Generoso, John Golden, Kal Hamze, Shell Oil Product[ ]s Company, Abraham Hamze, Tibor Hangyal, JES Service, Inc., Patrick Hines, Adam Hipp, Muhammad Imatiaz, Jay Jon, Kay Jon, Abdul Kafal, Jaque Kanaan, George Kantarges, Motiva Enterprise[s], Jim Kantarowski, William Kaufman, Hussein Kobessi, Mike Lamarche, James Moraidis, Sunny Patel, Ronnie Aboud, Constantin Peides, Russell Picard, Paul Richards, Harvy Rudnick, Fred Saad, Aziz Saba, Walid Samrout, Earl Stickney, Thomas Sullivan, Roger Thibault, Dimitrious Tsanikilides, Toufic Atallah, Dror Dusdushman, Earl McLaughlin, Stephen Shea, Wilson Tiburtino, J. Enterprise, Inc., Mahendrs Amin, Lasco Enterprise, Inc., Nikolas Manousaridis,

DATE	No.	PROCEEDINGS
		Larry Rubensein, Paul Sroczynski, Shell Oil Company, Massound Atalish, Mike Atalish. (Sanson, Paul) (Entered: 11/13/2008)
		* * * * *
11/19/2008	476	Judge Rya W. Zobel: ORDER entered. JUDGMENT entered dismissing Mr. Abraham's claims against Shell with prejudice and without costs to either party. (Urso, Lisa) (Entered: 11/19/2008)
		* * * * *

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Docket No. 05-2770

FRANCIS MARCOUX, *ET AL.*,
Plaintiffs,

MAC'S SHELL SERVICE, INC.; CYNTHIA KAROL; JOHN A. SULLIVAN; AKMAL, INC.; SID PRASHAD; RAM CORPORATION, INC.; J&M AVRAMIDIS, INC.; THREE K'S, INC.; STEPHEN PISARCZYK,
Plaintiffs-Appellants,

v.

SHELL OIL PRODUCTS COMPANY, LLC; MOTIVA ENTERPRISES, LLC; SHELL OIL COMPANY,
Defendants-Appellees.

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
11/30/2005	CIVIL CASE docketed. Opening forms sent. Notice of Appeal filed by Appellants Cynthia Karol, Sid Prash[a]d, John B. Sullivan, Mac's Shell, RAM Corp., J&M Avramidis, Inc., Akmal, Inc., Three K's, Inc., Stephen Pisarc[zy]k. Appearance form due 12/14/05. Docketing Statement due 12/14/05. Transcript Report/Order due 12/14/05. [05-2770] (JC)

DATE	PROCEEDINGS

* * * * *

06/21/2007	JUDGMENT entered: Upon consideration of the parties' stipulation of dismissal, it is hereby ordered that this appeal be voluntarily dismissed pursuant to Fed. R. App. P. 42(b) with each party to bear its own costs. This dismissal does not affect Appeal No. 05-2771, which remains open. Mandate to issue forthwith. [1259530- 1] [05-2770] (JC)
06/21/2007	MANDATE ISSUED. [05-2770] (JC)

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Docket No. 05-2771

FRANCIS MARCOUX, *ET AL.*,
Plaintiffs,

CYNTHIA KAROL; SID P[RA]SHAD; JOHN A. SULLIVAN; MAC'S SHELL SERVICE, INC.; RAM CORPORATION, INC.; J&M AVRAMIDIS, INC.; AKMAL, INC.; THREE K'S, INC.; STEPHEN PISARCZYK,
Plaintiffs-Appellees,

V.

SHELL OIL PRODUCTS COMPANY, LLC; MOTIVA ENTERPRISES, LLC; SHELL OIL COMPANY,
Defendants-Appellants.

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
12/02/2005	CIVIL CASE docketed. Opening forms sent. Notice of Appeal filed by Appellants Shell Oil Products, Motiva Enterprises and Shell Oil Company. Appearance form due 12/16/05. Docketing Statement due 12/16/05. Transcript Report/Order due 12/16/05. [05-2771] (JC)
12/02/2005	RECORD filed: 1 volume consisting of docket entries 369 and 371 (filed in 05-2770). No transcripts filed. [1065048-1] [05-2771] (JC)

DATE	PROCEEDINGS

* * * * *

01/03/2006 ORDER entered: The parties have filed cross-appeals in Civil Action No. 01-11300 (D. Mass). Pursuant to Fed. R. App. P. 28.1, it is hereby ordered that the above-named defendants be deemed the appellants/cross-appellees (?appellants?) and that the above-named plaintiffs be deemed the appellees/cross-appellants (?appellees?). The parties are directed to use the above caption on all future filings related to these cases. A briefing schedule will be set once the record on appeal, including all necessary transcripts, is complete and the stay is lifted. The attached information sheet sets forth the filing requirements for briefs filed pursuant to Fed. R. App. P. 28.1. [05-2770, 05-2771] (JC)

* * * * *

02/09/2006 SUPPLEMENTAL RECORD consisting of USDC transcript #'s: 383-385 filed. [1089331-1] [05-2770, 05-2771] (MC)

02/09/2006 Transcripts of #383: Jury Trial (day 10), 11/30/04; #384: Charge Conference, 12/6/04; #385: Trial, 5/5/05 filed by court reporter Shelly Killian in 05-2770 & 05-2771. [05-2770, 05-2771] (MC)

* * * * *

12/01/2006 SUPPLEMENTAL RECORD consisting of docket entries 399 and 402 filed. [1191380-1] [05-2771, 05-2770] (JC)

DATE	PROCEEDINGS

* * * * *

12/06/2006 Amended Notice of Appeal filed. Dist Ct #: 01-11300 Lead Dist Ct #: 01-11300 Entry Date of Order/Judgment: 10/27/06 Date Amended NOA Filed: 11/10/06 [05-2771] (JC)

12/15/2006 SUPPLEMENTAL RECORD consisting of docket entries 1, 4-10, 12-18, 20, 21, 23-27, 29, 30, 71-73, 76, 78-80, 82-89, 91-95, 97, 98, 106-112, 114-199, 228, 251, 252-260, 315, 316, 317-322, 329-335, 337-381, 387-392, 394-403 [1195816-1] Docket entries 152 and 164 filed under seal. ***FILED WITH 05-2770*** [05-2770, 05-2771] (JC)

12/15/2006 Transcript of November 22-24, 2004 jury trial filed by court reporter Valerie O'Hara. ***FILED IN 05-2770*** [05-2770, 05-2771] (JC)

12/15/2006 Transcript of May 5, 2005 motion hearing; November 17, 18, 19, 29, 2004 December 1, 3, 7 and 8, 2004 jury trial filed by court reporter Shelly Killian. ***FILED IN 05-2770*** [05-2770, 05-2771] (JC)

12/15/2006 Transcript of November 15, 16, 2004 trial filed by court reporter Richard Romanow. ***FILED IN 05-2770*** [05-2770, 05-2771] (JC)

* * * * *

02/15/2007 SUPPLEMENTAL RECORD consisting of docket entries 407 & 408 filed. [1215763-1] [05-2770, 05-2771] (JC)

DATE	PROCEEDINGS
02/15/2007	Amended Notice of Appeal filed. Dist Ct #: 01-11300 Lead Dist Ct #: 01-11300 Entry Date of Order/Judgment: 12/8/04, 12/10/04, 9/19/05, 8/31/06, 10/27/06 and 12/26/06. Date Amended NOA Filed: 1/16/07 [05-2771] (JC)
02/15/2007	Amended Notice of Appeal filed. Dist Ct #: 01-11300 Lead Dist Ct #: 01-11300 Entry Date of Order/Judgment: 12/8/04, 9/19/05, 8/31/06 and 10/27/06 Date Amended NOA Filed: 11/10/06 [05-2771] (JC)
	* * * * *
04/10/2007	BRIEF filed by Appellants Shell Oil Products, Shell Oil Company and Motiva Enterprises. Length: 86 pages, 18,647 words, Copies: 9, delivered by hand. Certificate of service date 4/9/07. [1235391-1] Appellee brief due 5/9/07 [05-2770, 05-2771] (JC)
	* * * * *
04/10/2007	JOINT APPENDIX filed. Copies: 5. Volumes: XI. Delivered by hand. Certificate of service date 4/9/07 [1237526-1] [05-2770, 05-2771] (JC)
04/12/2007	SUPPLEMENTAL RECORD consisting of trial exhibits filed. [1236595-1] [05-2770, 05-2771] **Filed in the exhibit room** (JC)
	* * * * *
06/01/2007	PUBLIC NOTE: Motion for voluntary dismissal of cross-appeal filed in 05-2770. [05-2771] (JC)

DATE	PROCEEDINGS

* * * * *

06/11/2007 SUPPLEMENTAL APPENDIX filed by the appellees. Copies: 5. Volumes: 1. Delivered by mail. Certificate of service date 5/30/07 [1255670-1] [05- 2770, 05-2771] (JC)

* * * * *

06/21/2007 BRIEF filed by Appellees Cynthia Karol, Steph[e]n Pisarc[z]yk, Sid Prash[a]d, John Sullivan, Mac's Shell, RAM Corp., J&M Avram[ ]idis, Inc., Akmal, Inc., Three K's, Inc. and Stephen Pisarc[zy]k. Length: 18,972 words, 80 pages, Copies: 10, delivered by mail. Certificate of service date 5/30/07. [1259568-1] Reply brief due 7/9/07. Reply brief deadline set from date appellees' brief was docketed. [05-2771] (JC)

* * * * *

06/21/2007 MOTION filed by Movant BP Products North America Inc. for leave to file amicus curiae brief and appendix in support of appellants and to accept amicus curiae brief instanter. Certificate of service dated 6/20/07, by mail. [05-2771] (JC)

* * * * *

07/06/2007 ORDER entered by Judge Kermit V. Lipez: BP Products' motion to file an amicus brief and appendix is provisionally granted. Plaintiffs may respond to the amicus brief in a supplemental appellee brief, not to exceed

DATE	PROCEEDINGS
	5000 words, to be filed within two weeks of the date of this order. In provisionally allowing the amicus brief to be filed, we do not now decide whether the amicus is impermissibly presenting a new argument on appeal, but rather leave that matter to the panel that will eventually decide the appeal. [05-2771] (JC)
07/06/2007	BRIEF filed by Amicus Curiae BP Products in 05-2771 in support of Appellants. Length: 23 pages, 5,656 words, Copies: 10, delivered by mail. Certificate of service date 6/20/07. [1264315-1] [05-2771] (JC)
07/06/2007	APPENDIX filed by Amicus Curiae BP Products. Copies: 5. Volumes: 1. Delivered by mail. Certificate of service date 6/20/07 [1264316-1] [05- 2771] (JC)
07/10/2007	REPLY BRIEF filed by Appellant[s] Shell Oil Products in 05-2771, Motiva Enterprises in 05-2771, Shell Oil Company in 05-2771. Length: 40 pages (8,933 words), Copies: 10, delivered by mail. Certificate of service date 7/9/07. [1265383-1] [05-2771] (RL)
	* * * * *
07/20/2007	OPPOSITION to BP Products North America, Inc's Amicus brief filed by Appellees Cynthia Karol, Steph[e]n Pisarc[z]yk, Sid Prash[a]d, John B. Sullivan, Mac's Shell, RAM Corp., J&M Avram[ ]idis, Inc., Akmal, Inc., Three K's, Inc. and Stephen Pisarc[zy]k. Certificate of service dated 7/20/07, by Federal Express. [1269388-1] [05-2771] (JC)

DATE	PROCEEDINGS

* * * * *

09/07/2007 SUPPLEMENTAL APPENDIX filed by Appellants Shell Oil Products, Motiva Enterprises and Shell Oil Company. Copies: 5. Volumes: 1. Delivered by mail. Certificate of service date 7/9/07. Provisionally filed NOT under seal per order of this date. [1285272-1] [05-2771] (JC)

09/07/2007 REPLY BRIEF filed by Amicus Curiae BP Products in 05-2771. Length: 6 pages, Copies: 10, Served by mail. Certificate of service date 8/9/07. [1285273-1] [05-2771] (JC)

09/07/2007 MOTION filed by Appellees Cynthia Karol, Steph[e]n Pisarc[z]yk, Sid Prash[a]d, John B. Sullivan, Mac's Shell, RAM Corp., J&M Avram[ ]idis, Inc., Akmal, Inc., Three K's, Inc. and Stephen Pisarc[zy]k to file sur-reply brief. Certificate of service dated 9/7/07, by Federal Express. [05-2771] (JC)

09/07/2007 PLEADING TENDERED: Sur-reply brief, filed by John F. Farraher for plaintiff-appellees. [1285524-1] Certificate of service date 9/7/07 [05-2771] (JC)

09/14/2007 CASE ARGUED 9/14/07. Torruella, Howard, Delgado-Colon, JJ. Paul D. Sanson for Appellant Shell Oil Company, Appellant Motiva Enterprises, Appellant Shell Oil Products. John F. Farraher for Appellee Stephen Pisarc[zy]k, Appellee Three K's, Inc., Appellee Akmal, Inc., Appellee J&M Avram[ ]idis, Inc., Appellee RAM Corp., Appellee Mac's

DATE	PROCEEDINGS
	Shell, Appellee John B. Sullivan, Appellee Sid Prash[a]d, Appellee Steph[e]n Pisarc[z]yk, Appellee Cynthia Karol (KT)
	* * * * *
04/18/2008	OPINION issued by Juan R. Torruella, Appellate Judge; Jeffrey R. Howard, Appellate Judge and Aida M. Delgado-Colon, U.S. District Judge. Published. [05-2771] (MH)
04/18/2008	JUDGMENT entered by Juan R. Torruella, Appellate Judge; Jeffrey R. Howard, Appellate Judge and Aida M. Delgado-Colon, U.S. District Judge. 05-2771 Affirmed/Reversed [05-2771] (MH)
04/25/2008	MOTION filed by Appellees Akmal, Inc., J&M Avram[ ]idis, Inc., Cynthia Karol, Mac's Shell, Steph[e]n Pisarc[z]yk, Stephen Pisarc[zy]k, Sid Prash[a]d, RAM Corp., John B. Sullivan and Three K's, Inc. to clarify opinion (published), [5240803-2]. Certificate of service dated 04/25/2008. [05-2771] (AS)
	* * * * *
05/02/2008	PETITION filed by Appellants Motiva Enterprises, Shell Oil Company and Shell Oil Products Company for rehearing and rehearing en banc. Certificate of service dated 05/02/2008 by FedEx. [05-2771] (AS)
	* * * * *

DATE	PROCEEDINGS
05/23/2008	ORDER entered by Michael Boudin, Chief Appellate Judge; Juan R. Torruella, Appellate Judge; Sandra L. Lynch, Appellate Judge; Kermit V. Lipez, Appellate Judge; Jeffrey R. Howard, Appellate Judge and Aida M. Delgado-Colon, U.S. District Judge denying petition for rehearing and rehearing en banc filed by Appellants Motiva Enterprises, Shell Oil Products Company and Shell Oil Company. [05-2771] (AS)
06/05/2008	ERRATA sheet to opinion (published) filed. [05-2771] (SBT)
06/06/2008	MANDATE Issued. [05-2771] (CP)
	* * * * *
06/19/2008	ORDER entered by Juan R. Torruella, Appellate Judge; Jeffrey R. Howard, Appellate Judge and Aida M. Delgado-Colon, U.S. District Judge of the District of Puerto Rico, sitting by designation on motion to clarify order filed by Appellees Steph[e]n Pisarc[z]yk, Akmal, Inc., Three K's, Inc., Stephen Pisarc[zy]k, Mac's Shell, J&M Avram[ ]idis, Inc., Cynthia Karol, John B. Sullivan, Sid Prash[a]d and RAM Corp. [05-2771] (AS)
	* * * * *

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

FRANCIS MARCOUX, et al[ ].,	)	
	)	[FILED
Plaintiffs,	)	JUL 27 '01]
vs.	)	
	)	C.A. No.:
SHELL OIL PRODUCTS	)	01-11300 RWZ
COMPANY, INC., and	)	
MOTIVA ENTERPRISES, LLC,	)	
	)	
Defendants	)	

COMPLAINT AND JURY DEMAND

INTRODUCTION

1. In response to the ruling in Civil Action number 00-11295-RWZ, the plaintiffs in the above-captioned matter are the franchisees and members of the Shell Dealers Legal Defense Group, which is the name of an unincorporated association of Shell gasoline station dealers that was originally named as a plaintiff. The Court ruled that the Shell Dealers Defense Group lacked standing. Thus, this action is being filed in the name of the individual franchisees, rather than that of the Shell Dealers Defense Group.

2. The filing of this action was necessitated by the actions of the defendants, including those of the Shell Oil Company, and the entities formed as a result of its "Alliance" with Texaco, Motiva Enterprises, LLC, Equiva Services LLC, and Equiva Trading Co., LLC; which have inflicted harm upon the Plaintiffs, including irreparable harm such as harm to the dealer Plaintiff's business

goodwill and reputations, and loss or threatened loss of the businesses of the dealer Plaintiffs, the latter being Shell branded franchised retailers throughout the Commonwealth. At a time when gasoline prices command national headlines, and Shell itself has stated that it is "awash in a Niagara Falls of cash"; Shell retailers are suffering from a decline in their business viability, as *approved by management at the highest levels of the Defendants. The Defendants had studies done known as the "Mercer Studies"; which showed that no retailers in the motor fuel industry were paying the rent levels that the Defendants planned to implement, and that indeed, the retailers would not survive such an implementation.*

Nonetheless they have gone forward [] with the implementation of what they call the "Strategic Marketing Initiative"; which, among other things, is reported to contain information on the displacement of lessee dealers by commission operated and salary operated retail outlets ("CORO" and "SORO").

On a more localized basis, the Defendants have created entities; known as the Regional Planning Units, which in turn developed key document packages known as the "Regional Planning Strategies," all of which were combined into a national master plan known as the Strategic Marketing Initiative. Shell has taken great pains to ensure that the "RPS" documents are not reviewed by anyone, because of the damning content.

At its core, the goal of the Initiative is to seize the value of the billions of dollars of investment, and the millions of hours invested by the plaintiff independent dealers, by raising the dealers[']costs, primarily station rent, and "wholesale" gasoline pricing, in order to insure the replacement of as many independent dealers as possible with a network of stations directly operated and/or con-

trolled by the Defendants, known as salary operated retail outlets (SORO) or commission operated retail outlets (CORO's). Regrettably, the Defendants can engage in this action, at very little cost to themselves, because the Plaintiff Dealers are locked into the stations by reason of their investment, and are contractually precluded from obtaining the exact same gasoline from distributors, at far lower prices. The Dealers must maintain their gasoline volumes by reason of minimum gallonage provisions in their contracts, or face the risk of franchise termination. Moreover, the Dealers are obligated to pay the oppressive new rent, that Shell calls "Program Rent" until such time that this Court declares this "DISENFRANCHISEMENT PROGRAM RENT" illegal or unenforceable.

The only constraint upon the devious plot of the Defendants is the legal and political opposition that can be mounted by the independent dealers in defense of their business; and the ability, or lack thereof, of the Defendants to staff the newly taken over locations. Because federal law, such as the Petroleum Marketing Practices Act, 15 U.S.C. 2801 et seq., prohibits the Defendant franchisors; Shell Oil Company and Motiva Enterprises, LLC; (collectively referred to as "Shell" or "Defendants"), as well as a number of state laws cited herein, prohibits a direct takeover of the dealer locations, Shell seeks to do indirectly, what it cannot do directly.

Shell's wrongful conduct includes, but is not limited to efforts to effectively evict the dealers from their franchised locations, by forcing unreasonable and oppressive franchise provisions upon the franchisees that would make continued operation of the franchises uneconomical, and would allow Shell, Motiva, and Equiva to take over the locations for their own account.

In other cases, Shell has attempted to argue that because they are offering renewal contracts to the dealers, they are not seeking to disenfranchise them. This argument is utterly meritless, and is truly disingenuous: Shell is offering renewals only because the PMPA compels it to, 15 U.S.C. 2802(a); and its argument is analogous to an axe murderer doing an autopsy on its victim, and proclaiming natural causes as the cause of death.

As noted, the primary tool used by this unholy trinity (Shell/Motiva/Equiva) is to increase the franchisees[']costs of doing business, while locking the franchisees into non-negotiable minimum purchase arrangements, and otherwise take unfair advantage of the fact that the dealers are locked into these locations by reason of their investment of time and money into the stations.

There are 4 key pillars to the disenfranchisement scheme: the Strategic Marketing Initiative; Regional Planning Systems, the new wholesale pricing practices reflected in the "MPSI Price Zones"; and application of the "SPEARS" (street back pricing evaluation and response system) in a manner to fix dealer margins at a level where the rent and other Shell/Motiva/Equiva imposed costs cannot be recovered. The actions of the Defendants are even more indefensible in light of the fact that the Shell Dealer Creed drafted by the defendants specifically calls for fair treatment generally; and specifically for a "fair allocation of profits between the retailer and the companies." The Defendants, through their new policies, practices and procedures, have redefined the term "fair" to mean, all for us, nothing for you. Indeed, the new policies are designed to minimize or eliminate dealer incomes.

Specifically, the Defendants[']new policies include (but are not limited to):

(a) using a contractor, MPSI of Tulsa, Oklahoma, to develop new "price zones" or in "Shell speak" price PADS, whereby the dealer locations targeted for conversion to company or commission operation pay a higher price for the same gasoline in the same purchase quantity than other Shell branded locations;

(b) attempting to economically evict the dealers[ ] from their franchised locations by terminating a rent program that has been the cornerstone of Shell's marketing program in place in excess of 16 years, a program known as the "Variable Rent Program"; which the dealers relied upon, and reasonably relied upon at the urging of Shell personnel extending to the highest level of the company.

In lieu of replacing the VRP with an equivalent or comparable program, something it pledged to do in the event the VRP was ever terminated, Shell is in the process of replacing the VRP or VRP substitute with a new oppressive rent program, known as "Program Rent," or charging full "Contract Rent" despite the fact that Shell openly stated [and] knew the dealers could not survive at "Contract Rent" levels.

Under this new rent structure, rents to the plaintiff dealers are universally increasing and increasing dramatically, often in excess of two to four times the rent that the dealers have been subject to since the establishment of their franchises, and in many cases, in excess of the annual profit of the business. It is this very rent program that representatives of Shell have expressly and/or impliedly assured the dealers year after year would never take affect, as Shell has been and remains aware that this oppressive rent structure all but guarantees the failure of all but a few select dealers.

Moreover in implementing the new rent plan, Shell wrote to the dealers that it would base the rents upon indepen-

dent appraisals, performed by a Member of the Appraisal Institute, using his or her best judgment. Instead of honoring this commitment, Shell proceeded to issue limiting instructions to the appraisers; and had them apply upward adjustments to various elements of the appraisal, resulting in a higher base value, which in turn was adjusted upward to ensure that the maximum rent could be extracted from the dealers.

Next, Shell provided a challenge procedure, whereby the dealer would pay for an appraisal under the limiting instructions, from a list of Shell approved appraisers, and thus, purporting to deny the dealer access to appraisals to be performed by other Members of the Appraisal Institute; and again the appraiser would not be allowed to simply apply the Uniform Standards of Professional Appraisal Practice in accordance with his or her best professional judgment: instead Shell insisted that the rules be slanted as it desired; also violating the law;

(c) imposing contract terms that shift costs of doing business such as maintenance of Shell owned property to the dealers; and that purport to illegally shift liability for actions such as increasing use of the controversial additive MTBE in its gasoline to the dealers; in violation of clear statutory prohibitions, or imposing minimum gallonage provisions in spite of statutory prohibitions thereupon,

(d) forcing dealers to offer their franchises for sale or assignment at [ ] fire sale prices, and telling a prospective franchisee that it can take only a worthless trial franchise (15 U.S.C. 2803) which allows Shell to exercise a right of first refusal clause in its contract. For example, plaintiff Kauser paid $350,000 for the rights to his franchise in 1998; and was forced to sell out for $50,000, allowing Shell to rid itself of the franchisee, and now company operate the station.

(e) charging Dealers exorbitant fees for a worthless convenience store franchise known as "ETD" or Experience the Difference; which is more aptly titled, "Emasculate the Dealer"; despite being warned by its consultant, Arthur Andersen, that the program would not produce nearly the results being used to induce the dealers to invest in the program, and actually pulling the core of the program, a software program known as "FMS" out of its company operated stations or the work as promised and

(f) other illegal actions as more fully set forth herein, which include, but are not limited to, [ ] an undisclosed rental charge in the gasoline price charged to the dealers during the time the VRP program was in effect.

The federal franchise law, the Petroleum Marketing Practices Act, 15 U.S.C. 2801, 2805, provides that the law of each dealer[']s home state governs the franchise agreements, and there are a number of Massachusetts state law claims in addition to the claims common to each dealer (breach of contract; breach of covenant of good faith and fair dealing, fraud, promissory and equitable estoppel, Massachusetts General Laws 93A and 93E, and U.C.C. provisions, including the 2-305 open price term provision), that must be applied in this action.

In any event, the key operative fact[ ] is that this action had to be brought because of Shell's decision to cannibalize the goodwill and business created by the Plaintiff dealers, who prior to the creation of Motiva had made Shell the #1 marketer of gasoline in the Country, and led many of these dealers to listen to Shell and oppose federal and state legislation on the basis that "it would cause Shell to cancel the VRP"; at the time that Shell was plotting their demise.

4. Through oppressive new contract terms, and changes to its marketing policies, practices and procedures, Shell

is inflicting ever higher costs of doing business, such as increasing its wholesale price of gasoline, or dealer tank-wagon price, both on an absolute scale and with respect to its competitors, and otherwise seeking to collect additional rent and fees from the dealers, in an effort to implement its dealer elimination scheme.

By virtue of this action, the Dealers seek relief from the new rent scheme, or at a minimum, that Shell live up to its promise to base the rent on the fair market value of the station, used as a service station, and have the value be arrived at by qualified Members of the Appraisal Institute using their best independent judgment; as opposed to being hamstrung by limiting instructions from Shell. In addition to relief from the oppressive franchise terms and practices, Plaintiffs seek actual and punitive damages, as well as statutory damages that may be allowed under the law.

The Dealers also seek to stem other immediate and irreparable harm in the form of a declaratory judgment adjudging the actions of Shell, and the offending provisions of the new franchise agreements to violate [ ] state and federal law.

JURISDICTION AND VENUE

2. This complaint[ ] is filed, and proceedings instituted pursuant to the following:

   (a) The Petroleum Marketing Practices Act, 15 U.S.C. 2805, providing for jurisdiction in this Court and venue in this court as well,

   (b) The federal Declaratory Judgment Act, 28 U.S.C. 1331,

   (c) supplemental jurisdiction over the following Massachusetts law claims:

      1. Fraud and Fraudulent Inducement

2. Promissory Estoppel
3. Equitable Estoppel
4. Breach of Contract
5. Breach of Implied Covenant of Good Faith and Fair Dealing

(B) Statutory Claims Applicable to All Plaintiffs

1. Breach of U.C.C. 2-103 (express covenant of good faith and fair dealing)
2. Breach of U.C.C. 2-202 (Unconscionability)
3. Breach of U.C.C. 2-305 (breach of open price term provision)

Massachusetts General Laws

Mass. Gen. Laws 93A: Unfair Trade Practices Act

93E: Gasoline Dealers Franchises

93: Massachusetts Antitrust Act

3. The Defendants are Delaware corporations, and the amount in controversy exceeds jurisdictional thresholds, therefore federal diversity jurisdiction is present.
4. The Plaintiffs are either Massachusetts corporations, residents of the Commonwealth, or have their principal place of business in the Commonwealth, thus providing for jurisdiction and venue in this Court under 15 U.S.C. 2805, as well as the general statutes.

PARTIES

5. The plaintiffs include the following Franchisees:

Plaintiff	Station Address
Ronnie Aboud	384 Washington Street, Braintree, MA and 1434 Washington Street, Hanover, MA
Abraham Abraham	264 Timpeny Boulevard, Gardner, MA
Mahendrs Amin	181 Main Street, Hudson, MA

Massoud Atalish	620 Belmont Street, Brockton, MA
Mike Atalish	1525 Smith Street, N. Providence, R.I.
Jordan Avramidis	920 Main Street, Walpole, MA
Chriss Azizian	10 HoJo Plaza, Dorchester, MA
Richard Baima	139 Medway Street, Milford, MA
Ed Baker	875 Highland Avenue, Needham, MA
Steve Black	372 Plymouth Avenue, Fall River, MA
Douglas Chapman	1095 Massachusetts Avenue, Lexington, MA
James Coggeshall	1612 Oak Street, Brockton, MA
Michael Corbett	1 Rutberford Avenue, Charlestown, MA
Patricia & Alex Dasilva	129 Ashley Boulevard, New Bedford, MA
Steve Falcone	712 Southbridge Street, Auburn, MA
George Fontaine	890 S. Washington Street, N., Attleboro, MA
Bill Fontaine	461 E. Washington Street, N., Attleboro, MA
Camille Francis	138 Haverhill Street, Methuen, MA
Steve Frangias	249 Main Street, Stoneham, MA
Matty Gaeta	14 Newbury Street, Peabody, MA
Donald Gagnon	535 Lynnway, Lynn, MA
John Generoso	511 Totten Pond Road, Waltham, MA
Joe Golden	612 Oak Street, Brockton, MA
Kal Hamze	111 North Street, Salem, MA and 987 Worchester Road, Wellesley, MA
Kal and Abraham Hamze	1100 Lakeview, Dracut, MA
Tibor Hangyal	201 Magazine Street, Cambridge, MA
Patrick Hines	1072 GAR Highway, Route 6, Somerset, MA
Adam Hipp	446 Station Avenue, S. Yarmouth, MA
Muhammad Imtiaz	189 Chelmsford Street, Chelmsford, MA and 431 Lincoln, MA
Jay & Kay Jon	520 Broadway, Revere, MA
Abdul Kafal	351 Bridge Street, Somerville, MA
Jacque Kanaan	27 Bridge St. Weymouth, MA
George Kantarges	26 Ocean Street, Dedham, MA
Jim Kantarowski	2128 Ocean Street, Marshfield, MA
Cynthia Karol	182 Pleasant Street, Attleboro, MA

William Kaufman	281 Orchard Street, Watertown, MA
Joe Kelleher	82 River Street, Dorchester, MA
Hussein Kobessi	280 Southbridge Street, Auburn, MA
Hussein Kobessi	747 Plantation Station, Worchester, MA
Mike Lamarche	436 Lancaster Street, Leominster, MA
Francis Marcoux	135 East Main Street, Southbridge, MA 123 East Main Street, Webster, MA
Richard Melanson	904 Main Street, Southbridge, MA
Akmal Moawed	302 W. Broadway, South Boston, MA
James Moraidis	962 Main Street, Waltham, MA
Sunny Patel	155 Providence Boulevard, N., Chelmsford, MA
Constantin Peides	394 Providence Highway, Westborough, MA
Russell Picard	128 Turnpike Road, Westborough, MA
Stephan Pisarcyk	114 Boylston Street, W. Boylston, MA
Sid Prashed	45 Madison Street, Worcester, MA
Paul Richards	1420 Main Street, S. Weymouth, MA
Harvy Rudnick	491 Walpole Street, Norwood, MA
Fred Saad	127 Main Street, Milford, MA
Aziz Saba	54 S. Main, Bradford, MA
Walid Samrout	54 Chauncy St, Mansfield, MA
Earl Stickney	26 Commercial Road, Leominster, MA
Thomas Sullivan	211 East Boston Street, E. Boston, MA
Roger Thibault	290 President Avenue, Fall River, MA
Dimitrious Tsanikilides	145 Spring Street, W. Roxbury, MA
Toufic Atallah	430 Taunton Avenue, Seekonk, MA
Dror Dusdushman	510 VFW Parkway, W. Roxbury, MA
Earl McLaughlin	123-127 Union, Ashland, MA
Stephen Shea	122 Boston Street, Lynn, MA and 110 Main Street, Reading, MA
John Sullivan	141 Front Street, Scituate, MA
Wilson Tiburtino	1363 S. Main & Broadway and 33 Mariano Bishop, Fall River, MA

6. Defendant, Shell Oil Products Company, Inc., was and is now, a corporation duly organized and existing

under the laws of the state of Delaware, with its principal place of business at One Shell Plaza, Houston, Texas 77067.

7. Defendant, Motiva Enterprises, LLC, ("Motiva") is a Delaware Limited Liability Corporation with its principal place of business at 12700 Northborough, Ste. 100, Houston, Texas 77067. It is a joint venture of Shell Oil Products Company, Inc., Texaco, Inc., and Saudi Aramco. These companies announced the formation and operational start up of Motiva on August 1, 1998. It is a combining of major elements of these companies, in Eastern and Gulf Coast United States refining and marketing businesses.

ALLEGATIONS of FACT

7. For many years, Shell had the best relationship with its dealers of any oil company, [and] was seen as [a] 'dealer orientated company'. This situation changed in the late 1990's and Shell/Motiva's conduct, such as its insistence upon franchise terms that were outlawed over its opposition in 1994, has made Shell difficult, if not impossible to deal with.

8. Most prominently, since the announcement of a joint venture with Texaco, resulting in the formation of the defendant, Motiva and Equiva Enterprises, LLC, the dealers[ ] have become targeted for elimination, pursuant to a plan that, on information and belief is called the "Strategic Marketing Initiative".

9. The SMI is contained in a series of documents and executive summaries that set[ ] forth the move to replace the dealers with company and commission operated stations, constrained only by legal and political opposition.

10. Indeed, the renewal contracts form a template for dealer elimination by purporting to allow the following:

    (1) imposition of oppressive and unconscionable rent increases on the dealers, that standing alone are often enough to force the dealer to either leave the location, allowing the company to change the location to a "CORO" or contractor operated retail outlet, or "SORO", salary operated retail outlet. The idea behind a "CORO" is to strip the retailers of their protected status as franchisees under state and federal law; while giving the company control over the retail pricing at the station.

    (2) attempting to illegally force assignees of dealer franchise agreements to take nearly valueless "trial franchises" as that term is defined in the Petroleum Marketing Practices Act, 15 U.S.C. 2801, as opposed to the regular franchise mandated by 15 U.S.C. 2801(1)(B)(iii); and 15 U.S.C. 2806(a), enabling Motiva to utilize its "first refusal right" to match offers to dealers at depressed or fire sale prices, or to remove anyone after one year if they so desire.

    (3) attempting to require, as a condition of renewal, that the dealer release Shell from claims arising out of prior franchise relationships; and

    (4) attempting to define new reasons for franchise termination in the franchise agreements, that are contrary to the PMPA.

11. The company has become so brazen, that some regional managers, including here in New England, have openly told the dealers "that at least two-thirds of them will be eliminated within two years.["]

12. This institutional arrogance is also reflected in the offending provisions of the contracts themselves, which are contrary to 1994 Amendments to the PMPA, Amendments that Shell and Texaco waged an unsuccessful campaign of distortion against in the 103rd Congress.

13. Under the 1994 Amendments, and 15 U.S.C. 2805, no company, especially these the two major opponents of the new provisions, may condition renewal of a franchise relationship, upon the inclusion of franchise provisions, that purport to waive any right the franchisee may have.

14. The Shell contracts, which are attached hereto, and incorporated herein by reference, contain provisions which purport to release any claims the franchisee may have under any previous agreement, See, Retail Sales Agreement at paragraph 28, Retail Facility Lease at paragraph 31.

15. The most effective of the dealer elimination tools is [] to increase the costs of doing business to the dealer. Shell has embark[ed] upon a new system of pricing at SORO's and CORO's that [is] designed to facilitate the dealer elimination and has engaged in other wholesale pricing manipulation that violate[s] the provisions of law, set forth, infra. The most obvious of the dealer elimination tools is the rent, and the failure to honor "The Pledge" that the Variable Rent program or its equivalent would be in place.

The Variable Rent Program

16. Prior to the late 1990's, Shell sold gasoline, gasoline related products and other products and services such as are commonly sold at retail gasoline stations (hereafter collectively, "gasoline products") to the public

only through independent franchised retail dealers such as the Plaintiffs. The principal product sold to the public by such dealers was gasoline and diesel fuel, but dealers also variously operated convenience markets, car washes and repair services.

17. The dealers have conducted and still conduct their retail operations under written franchise agreements with Shell. Such agreements consist of multiple preprinted documents unilaterally prepared by Shell.

18. The agreements are contracts of adhesion whose essential terms were not negotiable in any manner before execution. Pursuant to these contracts, Shell provides the station premises, which the dealer leases under a form ground lease entitled "Motor Fuel Station Lease", or in its most current version, a Retail Motor Fuel facility lease.

19. Shell also provided a written form "Dealer Agreement" as a part of the franchise package, which all dealers are required to execute. The latest version of the Document is called a Motor Fuel Supply Agreement. Each dealer purchased and purchases "Shell" branded petroleum products under this agreement for resale to the public.

20. Before Shell permitted a prospective dealer to enter into a franchise agreement, it required completion of a pro forma profit and loss statement for the proposed location. In New England, such prospective dealer statements were prepared together by the dealer and by Shell's representatives. Shell reviewed each such statement to satisfy itself as to the economic viability of the franchise before entering into a franchise agreement for that station. Such statements always clearly showed that the dealer's premises rent and cost of gasoline products, together, de-

termined the profitability of the dealer's business. The dealers relied on these projections in undertaking the franchise relationship; and Shell knew that the dealers relied thereon.

21. As set forth, *supra*, Gasoline costs and station rents are the largest components of the cost of doing business for a retail gasoline dealer, including the co[s]ts imposed upon the Plaintiff. Shell dealers buy gasoline from their franchisor, Shell, which has always and by contractual right unilaterally set the prices which the dealers pay for gasoline products. The Shell dealers' written motor fuel station leases include a stated rent that is known as "Contract Rent". That figure is and was set pursuant to a secret formula that remains unknown to the dealers to this day.

22. The "Contract Rent" is a figure that through the course of dealing has little meaning other than to serve as the baseline for calculation of the actual rent paid under the VRP. Dealers simply did not pay Contract Rent, and Shell and its representatives encouraged the Dealers to ignore the Contract Rent figure.

23. The actual station rents would be charged under a "variable rent program" by which Shell granted the dealers a credit against each following month's rent, usually at the rate of 4.5 cents for each gallon of motor fuel which the dealer purchased from Shell over a figure known as the "VRP Threshold".

24. The VRP threshold was set by local Shell management pursuant to a secret formula or guideline, which was often zero. In this way, Shell tied the actual station rents directly to the volume of gasoline being put through the station. This variable rent program, or VRP, resulted in dealers' effective station rent being far below the pre-printed "Contract Rent"; and in fact

when reviewing contracts for renewal of the franchise relationship, Shell personnel would go so far as to chide the Dealers[ ] for even looking at the Contract Rent figure.

25. The VRP was the foundation of the course of dealing between Shell and the dealers[ ] for over 16 years. Indeed, in a number of forums, such as other cases, and legislative hearings, high level Shell personnel with decision making authority have described the "VRP" as the cornerstone of Shell's marketing efforts, the item that allowed Shell to rise to the top of the U.S. gasoline volume charts and something that its competitors did not have an answer for.

26. While Shell has recently attempted to characterize the VRP as a voluntary program, every Shell dealer participated in the program, it was memorialized in various writings as well as through a 16 year course of dealing from Portland, Maine to Portland, Oregon, and in fact was not voluntary at all. Indeed, the VRP was such a critical component of the Shell marketing scheme, that Shell encouraged the dealers to oppose federal and state legislative initiatives on the claim that such legislation, if enacted, would require changes to, or elimination of the VRP.

27. Shell's written communications that contained the "offers of variable rent program," stated that Shell could, at its option, discontinue or modify the program on 30 days notice. Nevertheless, in addition to the course of dealing between the parties, the dealers' received numerous types of assurances that VRP or its equivalent would be there for them, to ignore the language of the VRP offer letters; and to ignore the contract rent figure, as it was something that they would not have to pay, as Shell knew that the Dealers

could not survive, much less prosper, if the VRP was terminated, and an equivalent substitute not put in its place.

28. For over 16 years, the dealers received assurances from the highest levels of the marketing department on down to the field sales representatives, that the VRP program would always be there for them, or that in the alternative, [] a program that would be the equivalent of VRP would be put in place as Shell was very aware that dealers could not pay the "Contract Rent" and survive.

29. These assurances were given to dealers through Shell's dealer panels, which were groups of dealers that Shell had appointed both regionally and nationally purportedly as representative of all dealers, as well as through general meetings of dealers in the geographic area and through individual communications by Shell representatives to current and prospective dealers. Shell kept the minutes of these meetings, and provided written transcripts thereof to the dealer representatives.

30. Other writings reinforce the point that the economic and legal reality was that the VRP was anything but a voluntary, short-term program, and that Contract Rent did not serve as anything other than a baseline for VRP calculation. For example, Shell also routinely provided to its dealers a document[ ] called the "Delivery Platform Summary", which indicated gasoline delivery volumes and changes in those delivery volumes. These documents prominently featured [] printed "variable rent calculations" which reflected the VRP allowance and calculated the actual (as distinguished from the stated) rent.

31. Shell, through its duly authorized representatives, encouraged and even demanded that the dealers take actions based upon the "VRP Pledge", and engaged in a pattern of misrepresentation with respect to the rent provision, and in reliance upon these representations, the Dealers made substantial investments including, but not limited to:

    (1) Purchasing the franchise rights at Shell branded stations;

    (2) purchasing the franchise rights of dealers that Shell did not like, due to the active encouragement of Shell management;

    (3) investing in ancillary business located at the motor fuel marketing premises such as convenience stores, and car washes; and

    (4) entering into renewals of the franchise relationship with Shell based upon the misrepresentations with respect to the contract rent, as opposed to taking other action, such as selling the franchise.

32. In addition, the Dealers" generally adopted a marketing strategy based upon paying "VRP rent" as opposed to "Contract Rent"; that enabled them to sell fuel to the public at prices lower than would be possible if "Contract Rent" was charged.

33. Again, all of these actions were taken in the context of a lengthy course of dealing, and Shell representatives telling the dealers to pay no attention to the Contract Rent, or the "offers of variable rent program" to the extent it stated that Shell could at its option discontinue or modify the program on 30 days' notice. There were innumerable representations to the effect that the "Contract Rent" was something the Dealers'

would never have to worry about, and never have to pay.

34. By using the variable rent program to tie the station rent directly to the volume of gasoline it delivered to each station, Shell made the ground rent a part of the price it charged the dealers for its gasoline products. Since defendants obtain their revenues from the operation of franchised independent retail Shell stations primarily from a combination of station rents and gasoline purchase prices, they have in practice and for their own business purposes treated station rents and gasoline sales revenues as interchangeable parts of their revenue stream. The dealers' profitability has in turn been based on the interdependence of reasonable rents and reasonable fuel prices. Among the claims of the dealers herein is a claim that an undisclosed rental charge was hidden in the price of gasoline.

35. At all times material hereto, defendants well knew that if the VRP program terminated, the price for gasoline products would become oppressively high and unfair and that the dealers[']profit would erode to such a point so as to force the dealers out of business.

36. By virtue of its status as a joint venture of Shell and Texaco, Motiva and Equiva are charged with knowledge of all that Shell knew and of all commitments Shell made to the dealers.

37. In entering into their franchise agreements and performing there under, the plaintiffs and all Shell dealers relied on the representations that the motor fuel station rents stated in the station leases were pro forma and would not be enforced, but that rents would be calculated under the VRP program or its equivalent. At no time until the events hereafter re-

lated did the dealers have any reason to suspect that these representations about the manner in which their actual rent was calculated were not truthful or would not be kept, or that defendants had any intention not to perform those promises throughout the relationship of the parties. The fact that defendants had intimate knowledge of the dealers[']] financial planning and of their actual financial results on a monthly basis, which plans and results reflected the critical role of the VRP rent program in maintaining the dealers' solvency, reinforced the dealers' belief that defendants would keep their promises about maintaining viable station rents.

38. Equiva and Motiva assumed Shell's responsibilities for day-to-day operations with the dealers August 1, 1998.

39. In and about July 1998, Equiva and Motiva informed plaintiffs that it was terminating the Variable Rent Program, effective shortly thereafter. Equiva and Motiva then offered dealers in various regions differing "substitute" gasoline rebate program which varied from the VRP program in [ ] significant respects.

40. Effective January 1, 2000, Motiva and Equiva abandoned the last of the substitute programs, and began doing what it said it would never do, because it knew the dealers[ ] could not survive: charge full "Contract Rent" or the new "Program Rent" for those dealers whose franchise relationships have come up for renewal. As set forth more fully, *infra*, these rents were often several multiples of the rents which the dealers had paid for many years under the prior VRP program.

41. Defendants' charging of the stated rents has made the operations of the Plaintiffs' locations, as well as those of an overwhelming majority of franchised Shell retail dealers' businesses uneconomical. This program has caused plaintiffs and other similarly situated dealers great losses, and some dealers are being forced into insolvency by it.

FAIR MARKET VALUE or PROGRAM RENT

42. In addition to charging the "Contract Rent" to those dealers who[se] franchises have not come up for renewal, the Defendants have moved ahead with Program Rent, or what is more accurately termed "disenfranchisement Program Rent". While this rent is ostensibly based upon the fair market value of the location, plus triple net expenses, the fact is that the retailers are not given a disclosure of the evaluation, and if challenged, the retailer is limited to choosing a Shell designated appraiser, paying for an appraisal, which the retailer is then not allowed to see! For example, unless and until confronted with sanctions motions, one of which recently resulted in a default judgment against an allied company, the Company denies having access to basic records such as credit card records and dealer files[ ]. The key point is that Shell top level management implemented this program fully knowing and intending that the dealers would not survive it; as evidenced by the Mercer consulting work, and consistent with the representations made to the dealers that the VRP or a substitute would always be in place, because Shell knew that the dealers could not survive without it.

PRICING

I. Shell's "Price Pads"

43. Shell sells its gasoline directly to its dealers, including the Plaintiffs, at "tank wagon" ("dealer tank wagon" or "DTW") prices established solely by Shell. Shell manufactures the gasoline it sells to the Plaintiffs at its refinery in various parts of the Country, and distributes its gasoline from facilities, known in the trade as "the rack", as delivery racks exist at this terminal where Shell, its distributors, and unbranded marketers pick up gasoline refined by or otherwise obtained by the defendants and certified by them to meet their trademark specifications.

44. Shell delivers all Shell gasoline directly to each of the Plaintiffs' stations in delivery trucks, *i.e.* tank wagons, owned and operated by Shell, or in some cases, Shell delivers gasoline to Plaintiffs via common carriers. The Plaintiffs are charged Shell's DTW price existing at the time the fuel is loaded at the applicable rack. Shell sells its gasoline to the Dealers, and the Dealers purchase their Shell gasoline in the course of interstate commerce.

45. The Plaintiffs do not, however, pay the same price for the same gasoline. Shell, in conjunction with a consulting firm known as MPSI, Inc., has recently changed its pricing system, and has arbitrarily established "price pads" or zones in the affected metropolitan areas. Contrary to economic reality, and course of dealing in the industry, Shell places individual stations in their own price zone, thus station[s] could be across the street from each other, but have different wholesale prices as Shell discriminates in its DTW prices to the Dealers.

46. Shell tank wagons are often "re-routed" when the original dealer-purchaser is unable, for some reason, to accept the fuel delivery. These "re-routed" tank wagons then deliver the identical load of gasoline to another dealer. Even though the gasoline is identical and the sale occurs within hours of the aborted sale, Shell often charges a different price for the gasoline to the ultimate dealer-purchaser.

47. The cost of transportation incurred by Shell in delivering the Dealers' gasoline does not justify these price differences. For example, many plaintiffs pay a DTW price for Shell gasoline delivered to their Shell stations than other Shell Dealers even though the other Shell dealers may be located more than 30 miles farther from Shell's distribution facility or rack.

48. The Dealers are competitors with each other for the retail sale of gasoline. Therefore, the differential in DTW prices charged by Shell to these dealers creates "favored" and "disfavored" classes of retail resellers of gasoline. The favored sellers are able to, and have in the past, dropped their retail (or "street") price of gasoline to correspond with the tank wagon discount afforded them by Shell. Such discounts in the street price for Shell gasoline causes economic injury to those competing with disfavored Shell Dealers, because the disfavored dealers must either reduce their "margin" by also dropping their street price, or face reduced sales of gasoline due to their higher street price.

49. On information and belief, Shell has designed the system so as to eliminate key competitors that should by any logic, be considered as competitors of the dealer operated stations. In addition to manipulating the MPSI system work in drawing the zones, Shell re-

gional personnel have substantial discretion in setting a wholesale price pursuant to a program known as SPEARS, or street back evaluation and response.

50. While the SPEARS program was ostensibly put in place to help the dealers, the fact is that it is now used as a method to limit dealer margins, and target the locations most fervently desired for company operation.

51. In addition to discriminating between franchisees, Shell also has a new program to benefit the CORO and SORO locations, and to make the claim to shareholders that these company operated locations are more profitable to Shell. Specifically, the profitability of these locations is judged by assuming no rent or other real estate occupancy cost (despite the fact that by operating the stations, Shell forgoes any rent); and more importantly, it assumes that the lower wholesale prices such as the jobber rack price, or the spot market price is the price charged for accounting purposes, not the much higher DTW or dealer tankwagon price.

52. Finally, Shell also sells its gasoline to unbranded marketers at prices 20 cents or more per gallon less than the DTW its charges the dealers. Even given a 4 cent per gallon brand value, and a maximum volume discount, this evidence shows that Shell's DTW is at least 12-15 cents per gallon higher than can be justified.

53. Shell has recently offered temporary "discounts" to [its] dealers of up to 2 cents per gallon, but is conditioning receipt thereof upon the dealer lowering his or her already squeezed margin even further; in a futile attempt to compete with the growing fleet of

CORO and SORO locations, which enjoy an artificial and discriminatory price advantage.

OTHER ELEMENTS Of The PLAN

54. In addition to the cost-price squeeze outlined above, Motiva and Equiva regional units were directed to set aside funds in their capital improvement budgets to "buy out" dealers, particular[ly] those who were likely to be involved in leading "cells of dealer resistance" or to otherwise survive the onslaught.

55. Two key provisions of the new contracts provide that Shell has the right to match any offer the dealer has for the business, and that any prospective assignee will be given a worthless trial franchise. These two provisions, combined with the squeeze on the dealer's profitability[ ] (most offers are based upon 3 years profits)[,] assure that Shell can reacquire the stations at firesale prices, and move forward with the grand plan to convert the network to company operation.

CAUSES OF ACTION

I: INJUNCTIVE RELIEF PURSUANT TO THE PETROLEUM MARKETING PRACTICES ACT

56. The plaintiff dealers repeat and incorporate by reference paragraphs 1-55 as if fully set forth herein.

57. The plaintiff dealers are franchised dealers of motor fuel in a contractual relationship with Shell, a refiner of motor fuel, as defined by the Petroleum Marketing Practices Act, 15 U.S.C. § 2801, et seq.

58. By terminating the Variable Rent Program and charging the plaintiff dealers the unconscionably high rents of the Contract Rent and Program Rent structures, and by revising the pricing structure, and imposing a number of "offending" provisions in the new

contracts [*sic*] terminated the plaintiff dealers' franchises.

59. Shell has made the changes to the franchise agreements in bad faith, and for the purpose of converting stations operated by the franchised dealers to CORO and SORO operation, i.e. for Shell's own account, in violation of the PMPA. Pursuant to the standards set forth by the Petroleum Marketing Practices Act, 15 U.S.C. the individual dealers seek a preliminary and permanent injunction preventing the imposition of either full "Contract Rent" or the "Program Rent". The injunctive relief is requested on the grounds that: the dealers' franchises have been constructively terminated by Shell's termination of the Variable Rent Program and failure to provide a similar alternative;

    there exists sufficiently serious questions going to the merits to make such questions a fair ground for litigation; and

    the hardship suffered by Shell by reinstating a rent program that it maintained for over 16 years would be minimal compared to the egregious harm that will occur to the dealers, that being the end of their businesses and livelihood, if such preliminary injunction is not granted.

II: VIOLATION OF THE PETROLEUM MARKETING PRACTICES ACT

60. The plaintiffs repeat and incorporate by reference paragraphs 1-59 as if full[y] set forth herein.

61. The plaintiff dealers are franchised dealers of motor fuel in a contractual relationship with Shell, a refiner of motor fuel, as defined by the Petroleum Marketing Practices Act, 15 U.S.C. § 2801, et seq.

62. The Petroleum Marketing Practices Act strictly regulates the requirements for a refiner of motor fuel, such as Shell, to terminate the franchises of dealers of motor fuel, such as the plaintiff dealers.

63. By terminating the Variable Rent Program and instituting the unconscionable rents under the Program Rent structure, in the face of its express and implied promises that it would not do so, Shell has and is terminating the dealers' franchises in violation of the Petroleum Marketing Practices Act.

64. By terminating the Variable Rent Program and instituting the unconscionable rents under the Program Rent structure, in the face of its express and implied promises that it would not do so, Shell has and is attempting to convert the dealers' franchises into commission operated retail outlets ("CORO"), or salary operated locations ("SORO"), in violation of the Petroleum Marketing Practices Act[,] 15 U.S.C. § 2802(b)(3)(A)(ii).

65. By including waiver and release clauses in its retail lease and service agreements, Shell has and is violating the Petroleum Marketing Practices Act, 15 U.S.C. § 2805.

66. In accordance with the provisions of the Federal Declaratory Judgment Act, 28[ ] U.S.C. § 1331, declaratory relief is requested that this Court enter a judgment that the actions of the Defendants as above described in this complaint have violated the provisions of the Petroleum Marketing Practices Act.

67. In addition, Plaintiffs seek monetary damages, compensatory and punitive, together with interest, costs, and attorney's fees, for all of the above violations and

the loss of value with respect to Plaintiffs' dealer franchises.

III: VIOLATION OF THE MASSACHUSETTS REGULATION OF BUSINESS PRACTICES FOR CONSUMERS PROTECTION

68. The plaintiffs repeat and incorporate by reference paragraphs 1-67 as if fully set forth herein.

69. The Defendants are in trade or commerce as defined by Massachusetts General Laws, Chapter 93A.

70. The acts of Shell/Motiva, including, without limitation, expressly misrepresenting to the dealers that the Variable Rent Program or a similar rent program would always be kept in place, in manipulating the price zones, charging a transfer price to CORO and SORO locations that is less than dealer tank wagon, and failure to implement the "Fair Market Value Rent" as promised constitute unfair and/or deceptive acts, as prohibited by the terms of Chapter 93A.

71. Plaintiffs seek monetary damages, compensatory and punitive, together with interest, costs, and attorney's fees, for all of the above violations and the loss of value with respect to Plaintiffs' dealer franchises.

VII: VIOLATION OF THE MASSACHUSETTS REGULATION OF DEALERS' AGREEMENTS FOR THE SALE OF GASOLINE

72. The Plaintiffs repeat and incorporate by reference paragraphs 1-71 as if full[y] set forth herein.

73. The Defendant, Shell/Motiva, is a supplier as defined by Massachusetts General Laws, Chapter 93E.

74. The acts of Shell/Motiva, including, without limitation, expressly misrepresenting to the dealers that the Variable Rent Program or a similar rent program

would always be kept in place, constitute failures on the part of Shell/Motiva to make requisite disclosures pursuant to Massachusetts General Laws, Chapter 93E, Section 3, et seq.

75. The acts of Shell/Motiva, including, without limitation, expressly misrepresenting to the dealers that the Variable Rent Program or a similar rent program would always be kept in place, constitute failures on the part of Shell/Motiva to make requisite disclosures pursuant to Massachusetts General Laws, Chapter 93E, Section 3, et seq.

76. The acts of Shell/Motiva, including, without limitation, expressly misrepresenting to the dealers that the Variable Rent Program or a similar rent program would always be kept in place, constitute unfair methods of competition and/or unfair and deceptive practices or acts as prohibited by Massachusetts General Laws, Chapter 93E, Section 5, et seq.

77. Plaintiffs seek monetary damages, compensatory and punitive, together with interest, costs, and attorney's fees, for all of the above violations and the loss of value with respect to Plaintiffs' dealer franchises.

IX: BREACH OF CONTRACT

78. The plaintiff[s] repeat[ ] and incorporate[ ] by reference paragraphs 1-77 as if full[y] set forth herein.

79. The acts of Shell/Motiva, including, without limitation, expressly misrepresenting to the dealers that the Variable Rent Program or a similar rent program would always be kept in place, constitute a breach of contract, actual or implied, between Shell and the dealers, that it would not do so.

80. Plaintiffs seek monetary damages, compensatory and punitive, together with interest, costs, and attorney's

fees, for all of the above violations and the loss of value with respect to Plaintiffs' dealer franchises.

X: FRAUD/MISREPRESENTATION

81. The plaintiff[s] repeat[ ] and incorporate[ ] by reference paragraphs 1-80 as if full[y] set forth herein.

82. The acts of Shell/Motiva, including, without limitation, expressly and intentionally misrepresenting to the dealers that the Variable Rent Program or a similar rent program would always be kept in place, constitute fraud, deceit and/or misrepresentation.

83. The dealers have relied on the misrepresentations of Shell in being induced to enter into their franchise agreements, to invest time and money into their franchises and have been induced to enter into renewals of their franchise agreements based on these misrepresentations.

84. As a direct result of their reliance on Shell's misrepresentations, the dealers have and are suffering immediate and irreparable harm, including, without limitation, extreme pecuniary loss.

85. Plaintiffs seek monetary damages, compensatory and punitive, together with interest, costs, and attorney's fees, for all of the above violations and the loss of value with respect to Plaintiffs' dealer franchises.

XI: PROMISSORY ESTOPPEL

86. The plaintiff[s] repeat[ ] and incorporate[ ] by reference paragraphs 1-85 as if full[y] set forth herein.

87. In order to induce the plaintiff dealers to enter into or renew their franchise agreements with Shell, the company promised and agreed that the Variable Rent Program or a similar alternative would always be maintained by Shell.

88. Pursuant to that promise, the plaintiff dealers made substantial investment, pecuniary and otherwise, into the establishment and growth of their respective franchises. Wherefore equity requires that Shell be stopped from now terminating the Variable Rent Program or a similar alternative.

XII: BREACH OF IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING

89. The plaintiff[s] repeat[ ] and incorporate[ ] by reference paragraphs 1-88 as if full[y] set forth herein.

90. At all times relevant, the franchise agreements between plaintiffs and defendants contained an implied covenant of good faith and fair dealing that neither party would do anything that would injure the right of the other to receive the benefits of the franchise agreements.

91. The acts of Shell/Motiva, including, without limitation, expressly misrepresenting to the dealers that the Variable Rent Program or a similar rent program would always be kept in place, constitute a breach of this implied covenant.

92. Plaintiffs seek monetary damages, compensatory and punitive, together with interest, costs, and attorney's fees, for all of the above violations and the loss of value with respect to Plaintiffs' dealer franchises.

JURY DEMAND

93. Plaintiffs[ ] claim trial by jury as to all causes of action.

PRAYER FOR RELIEF

Pursuant to the foregoing, the Plaintiffs pray that this Honorable Court:

1. Issue an injunction requiring Shell to maintain the Variable Rent Program, or an equivalent program, and to enjoin the instituting of the Program Rent structure, or charging the dealers "Contract Rent".
2 Enter a declaratory judgment adjudging the Offending Provisions of the Shell contracts to be unlawful under federal and state law.
3. Award damages, compensatory and punitive, including costs, interest, and attorneys' fees.

Award such other relief, as this Honorable Court deems reasonable and appropriate.

Respectfully Submitted:
The Plaintiffs,
By their attorneys

Dated:

/s/
ROBERT E. WEINER
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[Service Stamp: 7/26/01]

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 01-11300-RWZ

FRANCIS MARCOUX, ET AL.,

v.

SHELL OIL PRODUCTS CO., INC.
AND MOTIVA ENTERPRISES, LLC

MEMORANDUM OF DECISION

October 7, 2002

ZOBEL, D.J.

On June 30, 2000, lessee-dealers of Shell brand automobile gasoline, acting through the Shell Dealers Defense Group ("Group"), and other individual franchisees, filed an action against Shell Oil Products Company and Motiva Enterprises ("defendants") for numerous causes of action centered on the defendants' termination of its Variable Rent Program ("VRP"). *See Demetrios Tsaniklides, Jr., et al. v. Shell Oil Products Co., Inc. and Motiva Enterprises, LLC*, Civil Action No. 00-11295. After the Court determined that the Group did not have standing, the lessee-dealers sought to amend the complaint to add themselves in their individual capacities. On June 12, 2001, the Court denied the motion, but stated that plaintiffs "may file a new case which may be deemed to be related." On the same day, the Court ordered that the cases involving the Rhode Island plaintiffs and New

Hampshire plaintiffs be transferred to their respective states. The remaining parties subsequently stipulated to a dismissal of the action without prejudice. The present action seeking the same relief was then filed on July 27, 2001. Defendants have filed a Motion to Dismiss and a Motion for Judgment on the Pleadings.

Defendants contend that Counts One and Two of plaintiffs' Amended Complaint concerning constructive termination are barred by the one-year statute of limitations under the Petroleum Marketing Practices Act, 15 U.S.C. § 2805 ("PMPA"). Defendants assert that the statute of limitations began to run when Shell terminated the VRP on August 1, 1998, while plaintiffs allege that it began on January 1, 2000, when the VRP substitute was eliminated. Count One of the Amended Complaint states that plaintiffs seek injunctive relief on the grounds that the "dealers' franchises have been constructively terminated by Shell's termination of the Variable Rent Program or a similar alternative. . . ." (Paragraph 49, Subparagraph 1.) Count Two incorporates the same statement by reference. Paragraph 42 of the Amended Complaint states that Shell/Motiva abandoned the last substitution of the VRP on January 1, 2000 and began to charge "Contract Rent" or the new "Program Rent."

Viewing the facts as stated in the Amended Complaint in a light most favorable to the plaintiffs, the statute of limitations for the PMPA claims began to run on January 1, 2000. Plaintiffs then filed suit on June 30, 2000, well within the one-year statute of limitations. Since the present suit is deemed to relate back to the date of the original complaint in accordance with the Court's order dated June 12, 2001, plaintiffs' PMPA claims are not time barred. In fact, none of plaintiffs' claims, including the state law claims, is barred by the PMPA's statute of limi-

tations. Similarly, plaintiffs' claims under M.G.L. ch. 93E are timely.

Defendants also contend that the Rhode Island plaintiffs (except for Paul Sroczynski and his corporation, J. Enterprises) and the New Hampshire plaintiffs (except for Charles Lagasse, Kach Corporation and Ali Jaber), who did not file suit individually in the first action, are time barred. However, both sets of plaintiffs were parties to the first action as members of the Group. The Court ordered that the cases involving those out-of-state plaintiffs be transferred to their respective states pursuant to 28 U.S.C. § 1406(a). Because those actions relate back to the date of the first action, they, too, are timely.

Defendants' motion to dismiss plaintiffs' claim for fraud and misrepresentation is allowed. "In the First Circuit, Rule 9(b) requires a party pleading fraud to specify the time, place, and content of the alleged false representation." *Mead Corp. v. Stevens Cabinets, Inc.*, 938 F. Supp. 87, 90 (D. Mass. 1996). Paragraph 31 of the plaintiffs' amended complaint states that "[f]or over 18 years, the dealers received assurances from the highest levels of the marketing department on down to the field sales representatives, that the VRP would always be there for them. . . ." Plaintiffs have not specified either the time or place of defendants' misrepresentations regarding the VRP as required.

Finally, defendants' assertion that allegations of constructive termination of the franchise are not covered by the PMPA is simply wrong. *See Riverdale Enterprises Inc. v. Shell Oil Co.*, 41 F. Supp. 2d 56, 62 (D. Mass. 1999) (stating that "[a]bsent a claim of per se unlawful termination, a PMPA franchisee must show that a constructive termination has occurred.").

Accordingly, the defendants' Motion to Dismiss and Motion for Judgment on the Pleadings as to the plaintiffs' fraud and misrepresentation claim is allowed. As to all other claims, the motions are denied.

[October 7, 2002]
DATE

/s/ Rya W. Zobel
RYA W. ZOBEL
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

MAC'S SHELL SERVICE, INC., et al.,	)	[Filed 01/13/2003]
Plaintiffs,	)	C.A. No.
v	)	01-CV-11300-RWZ
SHELL OIL PRODUCTS COMPANY, LLC (f/k/a SHELL OIL PRODUCTS COMPANY), SHELL OIL COMPANY, and MOTIVA ENTERPRISES, LLC,	)	
Defendants.	)	

SECOND AMENDED COMPLAINT AND JURY DEMAND

I. INTRODUCTION

1. This civil action seeks to prevent irreparable and irremediable harm to Plaintiffs, which includes, *inter alia*, loss of Plaintiffs' businesses and harm to Plaintiffs' business goodwill and reputations. The Plaintiffs are franchised dealers of Shell brand automobile gasoline. The harm is occurring due to the wrongful conduct of the Defendant franchisors, Shell Oil Products Company LLC (f/k/a Shell Oil Products Company), Shell Oil Company and Motiva Enterprises, LLC, whose wrongful conduct includes such actions as forcing unreasonable and oppressive franchise provisions upon Plaintiffs that would make continued operation of Plaintiffs' franchises uneco-

nomical and would, in the regular course, allow Defendants to take over Plaintiffs' franchise locations for their own account.

2. Defendants are attempting to economically evict the dealers from their franchised locations by, among other things, terminating their rent programs that have been in place for over 18 years (knows as the "Variable Rent Program") without replacing it as promised and agreed to by Defendants with an equivalent or comparable rent program. Defendants have replaced the Variable Rent Program and a comparable Variable Rent Program substitute with a new oppressive non-comparable rent program, known as "Program Rent," or are now charging full rent described as "Contract Rent", despite an agreement between the parties that Contract Rent would not be charged. That Defendants made this agreement with Plaintiffs[ ] is not only evidenced by the oral representations made by Defendants to Plaintiffs, but also is established and evidenced by the long standing course of dealing and course of conduct that has taken place between Defendants and Plaintiffs[ ] since the Variable Rent Program was instituted in 1982, over twenty years ago.

3. Defendants fraudulently induced the Plaintiff franchisees to sign the written franchise agreements by misrepresenting their intentions concerning the duration of the Variable Rent Program. Defendants declared from the outset of the part[ies'] relationship that the Contract Rent provisions were to be inoperative and represented that it harbored no intention of invoking the Contract Rent provision; thus, these oral representations then became the basis of the binding agreement between the parties.

4. The Contract Rent provision was not the result of negotiations between the parties; rather, the provisions were inserted unilaterally by Defendants. It was Plaintiffs' acceptance of Defendants' assurances on the issue of the Variable Rent Program that constituted the parties' agreement on this issue and not the contradictory written provision in the franchise agreements which Plaintiffs were induced to sign.

5. When the Plaintiffs signed the franchise documents, which included in [them] the Contract Rent provision, and at the same time Defendants repeatedly and expressly stated that the provision was a mere technicality never to be effective, the parties did not adopt the franchise agreement as their complete integrated agreement. Rather, Plaintiffs only signed a document that contained terms that were expressly limited by Defendants' independent oral agreement guaranteeing a Variable Rent Program or its equivalent.

6. Where Defendants stood in a greatly disparate position with respect to Plaintiffs, Plaintiffs' reliance upon and acceptance of Defendants' oral representations limiting their written agreement were objectively reasonable, and these oral agreements became integral parts of the contracts between the parties.

7. Defendants have unilaterally changed the agreed upon term despite the fact that Defendants openly stated that they knew that the dealers could not survive economically without the Variable Rent Program or a comparable rent program. Defendants' actions in this regard amount[ ] to an economic termination of the dealers' franchises in violation of the Petroleum Marketing Practices Act, 15 U.S.C. § 2802 ("PMPA").

8. Under the new rent structure imposed by the Defendants, rents to the Plaintiffs are increasing drama-

tically, three to four times more than the rent that Plaintiffs have been subject to since the establishment of their franchises, in many cases, the new rent, be it Program Rent or Contract Rent, is in excess of the annual profit of Plaintiffs' businesses. The Contract Rent provisions are the very ones that Defendants' representatives promised and agreed would never take effect. Defendants remain aware that Program Rent or charging full Contract Rent all but guarantees the failure of all but a few of the Plaintiffs' franchises and businesses and will significantly and adversely reduce the value and profitability of those franchises that are able to survive.

II. Parties, Jurisdiction, and Venue

9. Plaintiff Abraham V. Abraham is a former Shell franchisee with a former principal place of business at 264 Timpany Blvd., Gardner, Massachusetts.

10. Plaintiff J & M Avramidis, Inc. (d/b/a Walpole Shell) is a Shell franchisee with a principal place of business at 920 Main St., Walpole, Massachusetts.

11. Plaintiff Expressway Service Station, Inc. is a Shell franchisee with a principal place of business at 10 Hojo Plaza, Dorchester, Massachusetts.

12. Plaintiff Richard H. Baima (d/b/a Plaza Shell), is a Shell franchisee with a principal place of business at 139 Medway St., Milford, Massachusetts.

13. Plaintiff E.H. Baker, Inc., is a former Shell franchisee with a principal place of business at 875 Highland Ave., Needham, Massachusetts.

14. Plaintiff Olive Street Associates, Inc. (d/b/a Plymouth Ave. Shell) is a Shell franchisee with a principal place of business at 372 Plymouth Ave., Fall River, Massachusetts.

15. Plaintiff James Coggeshall (d/b/a Jim's 139 Shell and Jim's Westgate) is a former Shell franchisee with principal places of business at Mazzeo Drive (Rt. 139), Randolph, Massachusetts and 612 Oak St., Brockton, Massachusetts.

16. Plaintiff Michael Corbett (d/b/a City Square Shell) is a Shell franchisee with a principal place of business at 1 Rutherford Ave., Charlestown, Massachusetts.

17. Plaintiff Ashley Mini Mart, Inc. is a Shell franchise with a principal place of business at 129 Ashley Blvd., New Bedford, Massachusetts.

18. Plaintiff Auburn Plaza Shell, Inc. is a former Shell franchisee with a principal place of business at 712 Southbridge St., Auburn, Massachusetts.

19. Plaintiff Tri-Fon Enterprises, Inc. is a Shell franchisee with principal places of business at 461 E. Washington St., N. Attleboro, Massachusetts and 890 S. Washington St., N. Attleboro, Massachusetts.

20. Plaintiff Kamil & Son, Inc. is a Shell franchisee with a principal place of business at 138 Haverhill St., Methuen, Massachusetts.

21. Plaintiff Gaeta Enterprises, Inc. is a Shell franchisee with a principal place of business at 14 Newbury St., Peabody, Massachusetts.

22. Plaintiff Casey's Lynnway Foodmart, Inc. is a Shell franchisee with a principal place of business at 535 Lynnway, Lynn, Massachusetts.

23. Plaintiff Totten Pond Shell, Inc. is a Shell franchisee with a principal place of business at 511 Totten Pond Rd., Waltham, Massachusetts.

24. Plaintiff Hamze Lakeview Service, Inc. is a Shell franchisee with a principal place of business at 1100 Lakeview, Dracut, Massachusetts.

25. Plaintiff Hamze Brothers, Inc. is a Shell franchisee with a principal place of business at 987 Worcester Road, Wellesley, Massachusetts.

26. Plaintiff Hamze Brothers Autocare, Inc. is a Shell franchisee with a principal place of business at 111 North Street, Salem, Massachusetts.

27. Plaintiff Magazine Beach Service, Inc. is a Shell franchisee with a principal place of business at 207 Magazine St., Cambridge, Massachusetts.

28. Plaintiff Hipp Enterprises, Inc. is a Shell franchisee with a principal place of business at 446 Station Ave., S. Yarmouth, Massachusetts.

29. Plaintiff Three K's, Inc. is a Shell franchisee with a principal place of business at 1220 Main St., Tewksbury, Massachusetts.

30. Plaintiff Ange's Service, Inc. is a former Shell franchisee with a principal place of business at 27 Bridge St., Dedham, Massachusetts.

31. Plaintiff JJK Enterprises Inc. (f/k/a Dedham Shell, Inc.) is a Shell franchisee with principal places of business at 2126 Ocean St., Marshfield, Massachusetts and formerly in Pembroke, Massachusetts.

32. Plaintiff Cynthia Karol (d/b/a Pleasant St. Shell) is a Shell franchisee with a principal place of business at 182 Pleasant St., Attleboro, Massachusetts.

33. Plaintiff William Kaufman is a Shell franchisee with a principal place of business at 281 Orchard St., Watertown, Massachusetts.

34. Plaintiff Kelleher Petroleum, Inc. is a Shell franchisee with a principal place of business at 82 River St., Dorchester, Massachusetts.

35. Plaintiff Kanes Shell FM, Inc. is a Shell franchisee with a principal place of business at 380 Southbridge St., Auburn, Massachusetts.

36. Plaintiff Plantation St. Shell, Inc. is a Shell franchisee with a principal place of business at 747 Plantation St., Worcester, Massachusetts.

37. Plaintiff Mina Enterprises, Inc. (d/b/a Mike's Super Shell Service) is a Shell franchisee with a principal place of business at 436 Lancester St., Leominster, Massachusetts.

38. Plaintiff Mac's Shell Service, Inc. is a Shell franchisee with principal places of business at 135 East Main St., Southbridge, Massachusetts and 123 East Main St., Webster, Massachusetts.

39. Plaintiff RAM Corporation, Inc. is a former Shell franchisee with a former principal place of business at 904 Main St., Southbridge, Massachusetts.

40. Plaintiff Akmal, Inc. is a Shell franchisee with a principal place of business at 302 West Broadway, S. Boston, Massachusetts.

41. Plaintiff Constantinos Peides is a Shell franchisee with a principal place of business at 394 Providence Highway, Westwood, Massachusetts.

42. Plaintiff Stephen Pisarczyk is a former Shell franchisee with a former principal place of business at 257 W. Boylston St., W. Boylston, Massachusetts.

43. Plaintiff Sid Prashad (d/b/a Madison Shell) is a Shell franchisee with a principal place of business at 48 Madison St., Worcester, Massachusetts.

44. Plaintiff Windsor Tire Co., Inc. is a former Shell franchisee with a principal place of business at 491 Walpole St., Norwood, Massachusetts.

45. Plaintiff JES Service, Inc. is a Shell franchisee with a principal place of business at 460 King St., Littleton, Massachusetts.

46. Plaintiff Reading Shell & Tire Center, Inc. is a former Shell franchisee with a principal place of business at 110 Main St., Reading, Massachusetts.

47. Plaintiff Terjac, Inc. is a former Shell franchisee with a principal place of business at 122 Boston St., Lynn, Massachusetts.

48. Plaintiff J. Enterprises, Inc. is a Shell franchisee with a principal place of business at 2345 Gar Hwy, Swansea, Massachusetts.

49. Plaintiff John A. Sullivan is a former Shell franchisee with a principal place of business at 141 Front St., Scituate, Massachusetts.

50. Plaintiff Taki's Shell, Inc. is a Shell franchisee with a principal place of business at 145 Spring St., W. Roxbury, Massachusetts.

51. Plaintiff Dedham Square Auto Service, Inc. is a Shell franchisee with a principal place of business at 525 Providence Pike, Dedham, Massachusetts.

52. Defendant Shell Oil Products Company LLC (f/k/a Shell Oil Products Company) is, upon information and belief, a limited liability company duly organized and existing under the laws of the state of Delaware, with its principal place of business of One Shell Plaza, Houston, Texas 77067.

53. Defendant Shell Oil Company is, upon information and belief, a corporation duly organized and existing un-

der the laws of the state of Delaware, with its principal place of business at One Shell Plaza, Houston, Texas 77067. Upon information and belief, at all times relevant, Shell Oil Products Company LLC (f/k/a Shell Oil Products Company) was an authorized agent and/or subsidiary of Shell Oil Company. Hereinafter, Shell Oil Company and Shell Oil Products Company LLC (f/k/a Shell Oil Products Company) may be referred to collectively as "Shell".

54. Defendant Motiva Enterprises, LLC ("Motiva") is, upon information and belief, a Delaware Limited Liability Corporation with its principal place of business at 12700 Northborough, Ste. 100, Houston, Texas 77067. Upon information and belief, Motiva was originally a joint venture of Shell Oil Company Texaco, Inc., Star Enterprises and Saudi Refining, Inc. These four companies transferred their marketing and refining assets east of the Appalachians to Motiva in August 1998. Upon information and belief, Texaco, Inc., and Star Enterprises subsequently divested themselves of any interest in Motiva.

55. This Court has jurisdiction and venue over this matter, as follows:

(a). This matter arises under The Petroleum Marketing Practices Act, 15 U.S.C. § 2805, providing for general federal question jurisdiction, 28 U.S.C. § 1331. Venue is proper in this Court, being a judicial district in which the franchisees conduct (or have conducted) business.

(b). The federal Declaratory Judgment Act, 28 U.S.C. § 2201.

(c). Supplemental jurisdiction under 28 U.S.C. § 1367 over the following pendent and/or ancillary state

law claims: (i) claims under Massachusetts General Laws chapters 93E and 93A; and (ii) claims pursuant to the Massachusetts contract and common law; and

(d). This Court has jurisdiction over the above-referenced state law claims and provisions, in the alternative, pursuant to the federal diversity statute, 28 U.S.C. § 1332. There is complete diversity between all of the Plaintiffs and all of the Defendants in this matter[;] each of the Defendants are Delaware companies with principal places of business in Texas and not in Massachusetts. Plaintiffs are each citizens of the Commonwealth of Massachusetts and the amount in controversy exceeds $75,000.00.

III. Allegations Of Fact

56. Since the announcement of the formation of Motiva, the Shell franchisee dealers have become targeted for elimination, pursuant to a plan that, on information and belief, is called the "Strategic Marketing Initiative."

57. The Strategic Marketing Initiative, upon information and belief, is contained in a series of documents and executive summaries that set[ ] forth the move to replace the franchisee dealers with company and commission operated stations.

58. The renewal of franchise contracts, as the prior contract term ends, target dealer elimination by:

(a). imposition of oppressive and unconscionable rent increases on the dealers, that standing alone are often enough to force the dealer to either leave the locations, and/or allow the franchisor to change the location to a contractor operated retail outlet ("CORO") or a salary operated retail outlet

("SORO"). The idea behind a "CORO" or "SORO" is to strip the retailers of their protected status as franchisees under federal and state law while giving the company control over the retail pricing at the station;

(b). attempting to illegally force assignees of dealer franchise agreements to take nearly valueless "trial franchises" as that term is defined in the Petroleum Marketing Practices Act, 15 U.S.C. § 2803, as opposed to the regular treatment of unexpired portions of franchise agreements as set forth in 15 U.S.C. § 2801(1)(B)(iii) and enabling Shell/Motiva to utilize its contractual "first refusal right" to match offers to dealers at depressed or fire sale prices, or to remove anyone after one year if they so desire.

(c). attempting to require, as a condition of renewal, that the dealer release Shell from claims arising out of prior franchise relationships, contrary to the Petroleum Marketing Practices Act; and

(d). attempting to define new reasons for franchise termination in the franchise agreements, that are contrary to the Petroleum Marketing Practices Act.

59. The Defendants' regional manager has openly stated to the dealers that many of them would be eliminated within two years.

60. This harsh attitude is also reflected in the provisions of the new franchise contracts themselves, which offend the 1994 Amendments to the Petroleum Marketing Practices Act. Under the Petroleum Marketing Practices Act 15 U.S.C. § 2802(a)(2), Shell is prohibited from failing to renew Plaintiffs['] franchise agreements and

under the 1994 Amendments specifically, 15 U.S.C. § 2805(f), no company, including Shell/Motiva, may condition renewal of the franchise by inserting new franchise provisions that cause Plaintiffs to waive any rights that Plaintiffs have under the Petroleum Marketing Practices Act and otherwise under both Federal and State Law.

61. The Shell franchise agreements contain provisions that purport to release any claims the franchisee may have under any previous agreement.

62. Shell has embarked upon a new system of pricing at CORO's and SORO's that is designed to facilitate dealer elimination and has engaged in other wholesale pricing and manipulation that violate the provisions of law. The most obvious of the dealer elimination tools is the rent, and the failure of Shell to honor its agreement and commitment to plaintiffs that the Variable Rent Program or its equivalent would always be in place. Moreover, Defendants have engaged in a practice of giving [their] CORO's and SORO's as well as other intermediary wholesalers known as "jobbers" a substantial and preferential discount on the wholesale price of Shell gasoline. Upon information and belief, CORO's, SORO's and jobbers purchase Shell gasoline from terminals in Massachusetts at a "rack price" established by Defendants. The rack price paid by CORO's, SORO's and jobbers is substantially lower than the dealer tank wagon ("DTW") price charged by Defendants to Plaintiffs for the same fuel purchased from the same terminal. Because of these higher prices, Plaintiffs are forced to sell their gasoline to consumers at prices that are substantially higher than the retail prices changed by CORO's, SORO's and jobbers. This has caused Plaintiffs' volume of gasoline sales (as well as profits) to decrease.

The Variable Rent Program

63. Prior to the late 1990's, Shell sold gasoline, gasoline related products and other products and services that are commonly sold at retail gasoline stations (hereinafter collectively, "gasoline products") to the public in New England almost exclusively through independent franchised retail dealers such as the Plaintiffs. The principal product sold to the public by such dealers was gasoline and diesel fuel, but some dealers also operated convenience markets, car washes and repair services.

64. The dealers have conducted and still conduct their retail operations under written franchise agreements with Shell/Motiva. Such agreements consist of multiple pre-printed documents unilaterally prepared by Shell/Motiva.

65. The franchise agreements are contracts of adhesion whose essential terms were not negotiable in any manner before execution by the dealer franchisees. Pursuant to these contracts, Shell provides the station premises, which the dealer leases under a lease entitled "Motor Fuel Station Lease", or in its most current version, a "Retail Motor Fuel Facility" lease.

66. Shell/Motiva also provided a written form "Dealer Agreement" as a part of the franchise package, which all dealers are required to execute. The latest version of the document is called a Motor Fuel Supply Agreement, under which Plaintiffs purchase Shell branded petroleum products for resale to the public.

67. Before Shell approved Plaintiffs as franchisees, it required many of the prospective franchisee to complete a *pro forma* profit and loss of statement for the proposed location. In New England, such prospective dealer statements were prepared together by the dealer and by Shell's representatives. Shell reviewed each such state-

ment to satisfy itself as to the economic viability of the franchise before entering into a franchise agreement for that station. Such treatments always clearly showed that the dealer's premises rent was calculated according to Shell's Variable Rent Program and this determined the profitability of the dealer's business. The dealers relied on these projections, which were part of their business plans. These business plans so calculated were submitted to financial institutions from whom Plaintiffs obtained loans, and in some instances included the Small Business Administration in undertaking the franchise relationship; Shell knew of the reliance thereon.

68. Gasoline costs and station rents are the largest components of the cost of doing business for a retail gasoline dealer, including the costs imposed upon the Plaintiffs. Shell dealers buy gasoline from their franchisor, Shell/Motiva, which has always by contractual right unilaterally set the prices which the dealers pay for gasoline products. The Shell dealers' written leases include a stated rent that is known as "Contract Rent." That figure is and was set pursuant to a secret formula that remains unknown to the dealers to this day. Shell representatives have expressly agreed and promised that this Contract Rent would not be charged and Plaintiffs[ ] have reasonably relied upon same to their detriment. That this contract rent would not be charged was also established by the course of dealing and course of conduct that took place between the parties.

69. The "Contract Rent" is a figure that through the course of dealing has little meaning other than to serve as the baseline for calculation of the actual rent to be paid under the Variable Rent Program. Dealers simply did not pay the Contract Rent, and Shell and its represen-

tatives encouraged each of the Plaintiffs to ignore the Contract Rent figure.

70. The actual station rents would be charged under the Variable Rent Program by which Shell granted to dealers a credit against the following month's rent, usually at the rate of 4.5 cents for each gallon of motor fuel which the dealer purchased from Shell over a figure known as the "VRP Threshold".

71. The VRP Threshold was set by local Shell management pursuant to a secret formula or guideline, which was often zero. In this way, Shell tied the actual station rents directly to the volume of gasoline being put through the station. This Variable Rent Program resulted in rent being far below the pre-printed "Contract Rent;" and, in fact, when reviewing contracts for renewal of the franchise relationship, Shell dealer representatives would go so far as to chide the Plaintiffs for even looking at the Contract Rent figure.

72. The Variable Rent Program was the foundation of the course of dealing between Shell and the dealers for over 18 years. While Shell has recently attempted to characterize the VRP as a voluntary program, every Shell dealer participated in the program. It was memorialized in various writings as well as through a 18-year course of dealing and, in fact, was not voluntary at all. Indeed, the VRP was such a critical component of the Shell marketing scheme that Shell previously encouraged the dealers to oppose federal and state legislative initiatives on the claim that such legislation, if enacted, would require changes to, or elimination of the VRP.

73. For over 18 years, the dealers received assurances from the highest levels of the marketing department on down to the field sales representatives, that the VRP would always be there for them, or that in the alterna-

tive, a program that would be the equivalent of VRP would be put in place as Shell was very aware that dealers could not pay the "Contract Rent" and survive.

74. These assurances were also given by Shell representatives to Shell's dealer panels, which were groups of dealers that Shell had appointed, regionally and nationally, purportedly to represent all dealers, as well as through general meetings of dealers in the geographic area and through individual communications by Shell representatives to current and prospective dealers[.] Shell kept the minutes of these meetings, and provided written transcripts thereof to the dealer representatives.

75. Other writings reinforce the point that the economic and legal reality was that the VRP was anything but a voluntary short-term program and that Contract Rent did not serve as anything other than a baseline for VRP calculation. For example, Shell also routinely provided to its dealers documents called the "Delivery Platform Summary," which indicated gasoline delivery volumes and changes in those delivery volumes. These documents prominently featured printed "variable rent calculations" which reflected the VRP allowance and calculated the actual (as distinguished from the contract) rent.

76. Shell, through its duly authorized representatives, encouraged and even demanded that the dealers take actions based upon the "VRP assurances and commitments", and engaged in a pattern of misrepresentation with respect to the rent provision. In detrimental reliance upon these representations, the Dealers made substantial investments, including but not limited to:

(a). purchasing the franchise rights at Shell branded stations;

(b). purchasing the franchise rights of dealers that Shell did not like, due to the active encouragement of Shell management;

(c). investing in ancillary business located at the motor fuel marketing premises such as convenience stores, and car washes; and

(d). entering into renewals of the franchise relationship with Shell based upon the misrepresentations with respect to the contract rent, as opposed to taking other actions, such as selling the franchise.

77. In addition, the Dealers adopted a marketing strategy based upon paying "VRP rent" as opposed to "Contract Rent;" it enabled them to sell fuel to the public at prices lower than would be possible if "Contract Rent" was charged.

78. All of these actions were taken in the context of a lengthy course of dealing and course of conduct, with Shell representatives telling the dealers to pay no attention to the Contract Rent, or the written "offers of variable rent program" to the extent it stated that Shell could, at its option, discontinue or modify the program on 30 days notice. There were numerous assurances and commitments that the VRP or its equivalent would be there for them and that the "Contract Rent" was something the Dealers would never have to worry about, and never have to pay as Shell knew that the Dealers could not survive, much less prosper, if the VRP was terminated, and an equivalent program not put in its place. The fact that Defendants had intimate knowledge of the dealers' financial planning and of their actual financial results on a monthly basis, which plans and results reflected the critical role of the VRP rent program in maintaining the dealers' solvency, reinforced the dealers' be-

lief that Defendants would keep their promises about maintaining viable station rents.

79. By using the VRP to tie the station rent directly to the volume of gasoline it delivered to each station, Shell effectively made rent a part of the price it charged the dealers for its gasoline products. The Defendants obtain their revenues from the operation of franchised independent retail Shell stations, primarily from a combination of station rents and gasoline purchase prices and Shell has treated station rents and gasoline sales revenues as interchangeable parts of their revenue stream. The dealers' profitability has in turn been based on the interdependence of reasonable rents and reasonable fuel prices.

80. At all times material hereto, defendants well knew that if the VRP program terminated, the price for gasoline products would become oppressively high and unfair and that the dealers['] profit would erode to such a point so as to force the dealers out of business.

81. By virtue of its status as a joint venture of Shell, Texaco, Star Enterprises and Saudi Refining, Inc., Motiva Enterprises, LLC is charged with knowledge of all that Shell knew and of all commitments Shell made to Plaintiffs.

82. Upon information and belief, Motiva assumed responsibility from Shell for the day-to-day operation of the dealer network on August 1, 1998. Moreover, and upon information and belief, Shell assigned to (and Motiva accepted) all of Shell's rights, obligations and liabilities arising under the franchise agreements.

83. Thereafter, Shell/Motiva informed Plaintiffs and all Shell dealers in Massachusetts, New Hampshire and Rhode Island that it was terminating the Variable Rent Program, effective August 1, 1998. Shell/Motiva then of-

fered dealers a "substitute" gasoline rebate program which, although similar to the VRP, was less advantageous to the Plaintiff dealers.

84. Effective January 1, 2000, Shell/Motiva abandoned the substitute gasoline rebate program, and began doing what it said it would never do and charged full "Contract Rent" or the new "Program Rent" for those dealers whose franchise relationships have come up for renewal. Both of these rent programs were economically oppressive and were not made in good faith and in the normal course of its franchise relationship with the plaintiffs.

85. The new "Program Rent" results in even more unconscionable and egregious rent than Contract Rent. The new rent structure presented by Program Rent is similar to Contract Rent in that it is based solely on information that Shell claims as confidential and proprietary and does not take into account performance-related variables in the computation of the dealers' rent. Upon information and belief, one of the elements considered by Shell/Motiva in establishing the Program Rent is the appraised value of the real estate from which the dealers operate.

86. As a result of the substantial increase in rent, among other things, Plaintiffs are finding it difficult (if not impossible) to continue to operate their franchises. In many cases where the dealers find themselves unable to meet the rent level set by Program Rent, Shell offers a mutual termination of the respective dealer['s] franchise, within which a release is contained that illegally attempts to prevent the dealer from bringing suit or otherwise seeking redress against Shell for its actions. Shell/Motiva have devised this method of requiring full Contract Rent or this new Program Rent for franchise renewals for the purpose of terminating the dealers' franchises and

to absolve Shell/Motiva of liability that unlawfully circumvents the stringent requirements of the Petroleum Marketing Practices Act in an attempt to take back the franchisees in violation of law.

Rack Rate v. Dealer Tank Wagon

87. Another means of exerting economic pressure upon Plaintiffs designed to force them out of business is to charge them a wholesale cost for gasoline that is substantially more per gallon than Defendants charge their company operated stations. Plaintiffs, in turn, are forced to sell their fuel to the consumer at prices that are higher than the retail prices charged by the company operated stations. This has caused Plaintiffs' volume of gasoline sales (as well as profit margins from those sales) to decrease.

88. Defendants sell their gasoline directly to their franchise dealers (including Plaintiffs) at a so-called dealer tank wagon ("DTW") price established solely by Defendants. Defendants deliver all gasoline directly to each of the Plaintiffs' stations in delivery trucks which are, upon information and belief, owned and operated by Defendants or, in some cases, by a common carrier.

89. Plaintiffs do not pay the same DTW. That is, they do not pay the same price for the same gasoline shipped from the same terminal by the same carrier. Rather, Defendants gerrymander numerous "price zones" (also know[n] as "pads") throughout the state and reportedly charge dealers within the same zone the same DTW.

90. Defendants[']' ability to establish these price zones comes from [their] standard dealer agreements with each dealer. Those agreements contain an open price term for the sale of gasoline, which requires Shell/Motiva to set the price for the gasoline in good faith.

91. Shell/Motiva have not set the price for gasoline in good faith as evidenced by Shell's/Motiva's discriminatory pricing practices including, without limitation, charging CORO's, SORO's and jobbers a substantially reduced price for gasoline than Shell/Motiva charge Plaintiffs.

92. The difference between Shell's/Motiva's rack price to CORO's, SORO's and jobbers (on the one hand) and DTW to Plaintiffs (on the other), force[s] Plaintiffs to charge their end-users (i.e. their customers) a higher retail cost for the same gasoline that is being sold to the public by the CORO's, SORO's and jobbers, thus giving Defendants' company owned stations a preferential and competitive advantage over Plaintiffs.

93. Defendants cannot reasonably justify the difference between Defendants' rack price and its DTW. Upon information and belief, the cost for manufacturing both is substantially identical as are the delivery costs and the volume ordered.

IV. CAUSES OF ACTION

COUNT I

INJUNCTIVE RELIEF PURSUANT TO THE PETROLEUM MARKETING PRACTICES ACT

94. The plaintiff dealers repeat and incorporate by reference paragraphs 1-93 as if full[y] set forth herein.

95. Plaintiffs are franchised dealers of motor fuel in a contractual relationship with Shell, a refiner of motor fuel, as defined by the Petroleum Marketing Practices Act, 15 U.S.C. § 2801, *et seq.*

96. By terminating the Variable Rent Program, among other things, and charging Plaintiffs the unconscionably high rents of the Contract Rent and Program

Rent structures, Shell has constructively terminated the Plaintiffs' franchises.

97. Pursuant to the standards set forth by the Petroleum Marketing Practices Act, 15 U.S.C. § 2801, the individual dealers seek a preliminary and permanent injunction (i) preventing the imposition of either full "Contract Rent" or the "Program Rent" and (ii) ordering the reinstatement of the VRP (or a similar rent credit program).

98. The injunctive relief is requested on the grounds that:

(a). the dealers' franchises have been constructively terminated by Shell's termination of the Variable Rent Program or a similar alternative;

(b). there exists sufficiently serious questions going to the merits to make such questions a fair ground for litigation; and

(c). the hardship suffered by Shell by reinstating a rent program that it maintained for over 18 years would be minimal compared to the egregious harm that will occur to the dealers, that being the end of their businesses and livelihood, if such preliminary injunction is not granted.

COUNT II

VIOLATION OF THE PETROLEUM MARKETING PRACTICES ACT

99. The plaintiffs repeat and incorporate by reference paragraphs 1-98 as if full[y] set forth herein.

100. Plaintiffs are franchised dealers of motor fuel in a contractual relationship with Shell, a refiner of motor fuel, as defined by the Petroleum Marketing Practices Act, 15 U.S.C. § 2801, *et seq.*

101. The Petroleum Marketing Practices Act strictly regulates the requirements for a refiner of motor fuel, such as Shell, to terminate the franchises of dealers of motor fuel, such as Plaintiffs.

102. By terminating the Variable Rent Program and instituting the unconscionable rents under the Program Rent structure, among other things, in the face of its express and implied promises that it would not do so, Shell has and is terminating the Plaintiffs' franchises in violation of the Petroleum Marketing Practices Act.

103. By terminating the Variable Rent Program and instituting the unconscionable rents under the Program Rent structure, in the face of its express and implied promises that it would not do so, Shell has and is attempting to convert the dealers' franchises into CORO's or SORO's in violation of the Petroleum Marketing Practices Act[,] 15 U.S.C. § 2802(b)(3)(A)(ii).

104. By including waiver and release clauses in its retail lease and service agreements, Shell has and is violating the Petroleum Marketing Practices Act, 15 U.S.C. § 2805.

105. As a result of Shell's violation of the Petroleum Marketing Practices Act aforesaid, Plaintiffs have and continue to sustain monetary damages.

106. As a result of Shell's violations of the Petroleum Marketing Practices Act aforesaid, Plaintiffs are entitled to, among other things, compensatory and punitive damages, together with interest, costs, and attorney's fees, for all of the above violations and the loss of value with respect to Plaintiffs' dealer franchises.

COUNT III
VIOLATION OF MASSACHUSETTS GENERAL LAWS CHAPTER 93A

107. The Plaintiffs repeat and incorporate by reference paragraphs 1-106 as is full[y] set forth herein.

108. Shell is engaged in trade or commerce as defined by Massachusetts General Laws, Chapter 93A.

109. Shell's/Motiva's efforts to force the Plaintiffs out of business by placing economic pressures on the Plaintiffs which include, among other things, the imposition of unconscionable rents and charging Plaintiffs substantially higher wholesale costs for motor fuel than CORO's, SORO's and jobbers, constitute unfair and/or deceptive acts, as prohibited by the terms of Chapter 93A.

110. Plaintiffs have been damaged by Defendants[']knowing and willful violation of M.G.L. c. 93A §§ 2 & 9.

111. Plaintiffs seek monetary damages, compensatory and punitive, together with interest, costs, and attorney's fees, for all of the above violations and the loss of value with respect to Plaintiffs' dealer franchises.

COUNT IV
VIOLATION OF THE MASSACHUSETTS REGULATION OF DEALERS' AGREEMENTS FOR THE SALE OF GASOLINE

112. The Plaintiffs repeat and incorporate by reference paragraphs 1-111 as if full[y] set forth herein.

113. Shell is a supplier as defined by Massachusetts General Laws, Chapter 93E.

114. Shell's acts, including, without limitation, expressly misrepresenting to the dealers that the Variable Rent Program or a similar rent program would always be kept in place, constitute failures on the part of Shell to

make requisite disclosures pursuant to Massachusetts General Laws, Chapter 93E, Section 3, *et seq.*

115. Shell's acts, including, without limitation, expressly misrepresenting to the dealers that the Variable Rent Program or a similar rent program would always be kept in place, constitute unfair methods of competition and/or unfair and deceptive practices or acts as prohibited by Massachusetts General Laws, Chapter 93E, Section 5, *et seq.*

116. Plaintiffs seek monetary damages, compensatory and punitive, together with interest, costs, and attorney's fees, for all of the above violations and the loss of value with respect to Plaintiffs' dealer franchises.

COUNT V

BREACH OF CONTRACT

117. The Plaintiffs repeat and incorporate by reference paragraphs 1-116 as if full[y] set forth herein.

118. The elimination of the Variable Rent Program and its replacement program constitute a breach of contract.

119. Plaintiffs seek monetary damages, compensatory and punitive, together with interest, costs, and attorney's fees, for all of the above violations and the loss of value with respect to Plaintiffs' dealer franchises.

COUNT VI

BREACH OF CONTRACT - OPEN PRICE TERM

120. The Plaintiffs repeat and incorporate by reference paragraphs 1-119 as if full[y] set forth herein.

121. Plaintiffs' franchise agreements with Shell/Motiva contain an open price term for the sale of gasoline, which requires Shell/Motiva to set the price for the gasoline in good faith.

122. Shell/Motiva have not set the price for gasoline in good faith as evidenced by Shell's Motiva's discriminatory pricing practices including, without limitation, charging CORO's, SORO's and jobbers a substantially reduced price for the same gasoline than Shell/Motiva charge Plaintiffs.

123. The difference between Shell's/Motiva's rack price to CORO's, SORO's and jobbers (on the one hand) and DTW to Plaintiffs (on the other), force[s] Plaintiffs to charge their end-users (i.e. their customers) a higher retail cost for the same gasoline being sold to the public by the CORO's, SORO's and jobbers thus giving Defendants' company owned stations a preferential and competitive advantage over Plaintiffs for the same product. The higher prices charged to Plaintiffs result in lost customers, who apparently turn to company operated stations with lower prices.

124. As a result of Shell's/Motiva's breaches aforesaid, Plaintiffs have been (and continue to be) damaged.

COUNT VII

BREACH OF IMPLIED WARRANTY OF GOOD FAITH AND FAIR DEALING

125. The Plaintiffs repeat and incorporate by reference paragraphs 1-124 as if full[y] set forth herein.

126. The aforementioned franchise agreements contained an implied warranty of good faith and fair dealing which provides that neither party shall do anything that will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract.

127. As a result of Defendants' conduct aforesaid, Defendants have breached the Covenant of Good Faith and Fair Dealing.

128. As a direct result of Defendants' breach, Plaintiffs have sustained (and will continue to sustain) damages.

129. Plaintiffs seek monetary damages, compensatory and punitive, together with interest, costs, and attorney's fees, for all of the above violations and the loss of value with respect to Plaintiffs' dealer franchises.

COUNT VIII

PROMISSORY ESTOPPEL

130. The Plaintiffs repeat and incorporate by reference paragraphs 1-129 as if full[y] set forth herein.

131. In order to induce the plaintiff dealers to enter into or renew their franchise agreements with Shell, the company promised and agreed that the Variable Rent Program or a similar alternative would always be maintained by Shell.

132. Pursuant to that promise, the plaintiff dealers made substantial investment, pecuniary and otherwise, into the establishment and growth of their respective franchises.

133. Wherefore equity requires that Shell be stopped from now terminating the Variable Rent Program or a similar alterative.

COUNT IX

DECLARATORY JUDGMENT

134. The Plaintiffs repeat and incorporate by reference paragraphs 1-133 as if full[y] set forth herein.

135. An actual controversy exists between Plaintiffs, on the one hand, and Shell, on the other hand, as to whether Shell violated the Petroleum Marketing Practices Act and/or the Plaintiffs' franchise agreements when it (i) eliminated the VRP and failed to replace it

with a similar substitute rent program, and (ii) included waiver and release clauses in its retail lease and service agreements.

136. In accordance with the provisions of the Federal Declaratory Judgment Act, 28 U.S.C. § 2201, declaratory relief is requested that this Court enter a judgment that the actions of the Defendants as above described in this complaint have violated the provisions of the Petroleum Marketing Practices Act.

V. Relief Requested

WHEREFORE, the Plaintiffs respectfully request[ ] the following relief:

1. That, as to Count I, the Court, in accordance with 15 U.S.C. § 2801, *et seq.* and Fed. R. Civ. P. 65, issue a temporary restraining order and, following a hearing, issue a preliminary injunction affirmatively requiring and ordering that:

(a). Shell Oil Products Company, LLC, Shell Oil Products Company, Shell Oil Company, Motiva Enterprises, LLC and their respective successors, agents and affiliates are ordered to re-institute the Variable Rent Program (or similar rent reduction program); and

(b). Shell Oil Products Company, LLC, Shell Oil Products Company, Shell Oil Company, Motiva Enterprises, LLC and their respective successors, agents and affiliates are enjoined from charging "Contract" or "Program" rent.

2. That, as to Count II, this Court enter a judgment in favor of Plaintiffs and against [ ] Shell Oil Products Company, LLC, Shell Oil Products Company, Shell Oil Company, and Motiva Enterprises, LLC and award Plaintiffs their actual damages (includ-

ing, without limitation, lost profits and the diminution of the value of [their] business), exemplary damages, treble damages, costs, interest, attorney's fees, expert witness' fees and all other damages recoverable under the Petroleum Marketing Practices Act, 15 U.S.C. § 2801, *et seq.*

3. That, as to Count III, this Court enter a judgment in favor of Plaintiffs and against [ ] Shell Oil Products Company, LLC, Shell Oil Products Company, Shell Oil Company, and Motiva Enterprises, LLC and award Plaintiffs their actual damages (including, without limitation, lost profits and the diminution of the value of [their] business), exemplary damages, treble damages, costs, interest, attorney's fees, expert witness' fees and all other damages recoverable under law.

4. That, as to Count IV, this Court enter a judgment in favor of Plaintiffs and against [ ] Shell Oil Products Company, LLC, Shell Oil Products Company, Shell Oil Company, and Motiva Enterprises, LLC and award Plaintiffs their actual damages (including, without limitation, lost profits and the diminution of the value of [their] business), costs, interest, attorney's fees all other damages recoverable under law.

5. That, as to Counts V-VIII, this Court enter a judgment in favor of Plaintiffs and against [ ] Shell Oil Products Company, LLC, Shell Oil Products Company, Shell Oil Company, and Motiva Enterprises, LLC and award Plaintiffs damages, costs, interest, attorney's fees all other damages recoverable under law.

6. That, as to Count IX, this Court enter a declaratory judgment in favor of Plaintiffs and against [ ]

Shell Oil Products Company, LLC, Shell Oil Products Company, Shell Oil Company, and Motiva Enterprises, LLC pursuant to 28 U.S.C. 2201, *et seq.* declaring and adjudging that the elimination of the Variable Rent Program violates the terms of the parties['] franchise agreement and the Petroleum Marketing Practices Act, 15 U.S.C. § 2801, *et seq.*

7. That the Court grant other such further relief as it deems just and appropriate.

PLAINTIFFS DEMAND A TRIAL BY JURY ON ALL CLAIMS SO TRIABLE.

Respectfully submitted,
MAC'S SHELL SERVICE, INC., et. al.
By their attorneys,

_____

Gary R. Greenberg (BBO# 209420)
John F. Farraher, Jr. (BBO# 568194)
GREENBERG TRAURIG, LLP
One International Place, 3rd Floor
Boston, Massachusetts 02110
617-310-6000

DATED: December __, 2002

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 01-11300-RWZ

IN RE SHELL OIL PRODUCTS CO.
DEALER FRANCHISEE LITIGATION

ORDER

January 13, 2003

ZOBEL, D.J.

In accordance with the agreement of the parties at the Status Conference held on December 12, 2002, the Court selects the following plaintiffs for the first trial.

1. J & M Avramidis, Inc. (d/b/a Walpole Shell)
2. Three K's, Inc.
3. Cynthia Karol (d/b/a Pleasant St. Shell)
4. Mac's Shell Service, Inc.
5. RAM Corporation, Inc.
6. Akmal, Inc.
7. Stephen Pisa[r]czyk
8. Sid Prashad (d/b/a Madison Shell)
9. Reading Shell & Tire Center
10. John A. Sullivan

It is so ordered.

[January 13, 2003]
DATE

/s/ Rya W. Zobel
RYA W. ZOBEL
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 01-11300-RWZ;
MDL DOCKET NO. 1461

FRANCIS MARCOUX, ET AL.,

v.

SHELL OIL PRODUCTS CO., INC., ET AL.

MEMORANDUM OF DECISION

October 22, 2003

ZOBEL, D.J.

Plaintiffs, Shell gas station franchisees, are suing defendants Shell Oil Products Company, Motiva Enterprises, and Shell Oil Company for numerous causes of action based on defendants' termination of the Variable Rent Program ("VRP") and an equivalent substitute program, both of which allowed franchisees to offset monthly rents with the proceeds of gasoline sales. The VRP was eliminated on August 1, 1998, and the substitute program ended on January 1, 2000. Plaintiffs, acting as an unincorporated organization, filed a predecessor action about six months later. See *Tsaniklides v. Shell Oil Products Co., Inc.*, No. 00-cv-11295. After the Court determined that the plaintiffs' organization did not have standing, the franchisees voluntarily dismissed their Complaint and filed the present action on July 27, 2001. Since 2000, all

plaintiffs have signed new lease agreements with defendants.

As a result of the VRP's termination, plaintiffs allege that their rents have increased between two- and six-fold. According to plaintiffs, the rent hikes were designed to force franchisees out of business and to minimize the cost to Shell of converting the gas stations into company-owned retail outlets. On July 30, 2003, plaintiffs filed a motion for a preliminary injunction pursuant to the Petroleum Marketing Practices Act ("PMPA"), 15 U.S.C. § 2805(b)(2). Plaintiffs propose that the injunction restore their rent payments to July 1998 levels, plus a 5% annual increase, or at the very least to the levels set by the substitute program that replaced the VRP until January 2000.

In order to be entitled to preliminary injunctive relief under the PMPA, a franchisee must show "(i) the franchise of which he is a party has been terminated or the franchise relationship of which he is a party has not been renewed, and (ii) there exist sufficiently serious questions going to the merits to make such questions a fair ground for litigation." 15 U.S.C. § 2805(b)(2)(A). Additionally, the balance of the hardships must favor the franchisee over the franchiser. *Id.*, § 2805(b)(2)(B). The present case raises difficulties on the first prong because defendants did not terminate or fail to renew any of plaintiffs' leases. All plaintiffs have signed new lease agreements since the end of the VRP and VRP substitute. The existence of new lease agreements in itself is not necessarily fatal to plaintiffs' position. "[A] franchisee who signs a successor contract under protest and promptly seeks to invoke its rights under the PMPA . . . has not 'renewed' the franchise relationship so as to bar relief under the PMPA." See *Pro Sales, Inc. v. Texaco, U.S.A.*, 792 F.2d

1394, 1399 (9th Cir. 1986). In *Pro Sales* the plaintiff signed a successor lease but only did so under protest, immediately filed suit under the PMPA, and sought a temporary restraining order. By contrast, the franchisees in this case have waited years before seeking preliminary injunctive relief. The lengthy period of time that elapsed before plaintiffs filed this motion not only calls into question whether the first prong of § 2805(b)(2) is satisfied, but more important, it makes a preliminary injunction inappropriate at this stage in the litigation. Granting injunctive relief in order to turn the clock back to July 1998 or to a time before January 2000 would exceed the Court's power "to preserve the status quo between the parties during the pendency of the litigation." *Dersch Energies, Inc. v. Shell Oil Co.*, 314 F.3d 846, 863 (7th Cir. 2002).

One of the grounds plaintiffs cite for the necessity of a preliminary injunction is that defendants' repeated delays in producing discovery have prolonged this litigation and, by extension, plaintiffs' payments of ruinously high rents. Along with the motion for injunctive relief, plaintiffs have filed two motions relating to discovery: a motion to compel answers to interrogatories and for sanctions and a motion for entry of default judgment and for monetary sanctions. Defendants, in turn, have filed a cross-motion for sanctions. Plaintiffs' motions are not without merit; the record reflects that defendants have been exceedingly slow in responding to plaintiffs' interrogatories. Plaintiffs served defendants with interrogatories on January 16, 2003. Despite repeated requests for responses to the interrogatories, answers were not served until late April. After plaintiffs complained in an April 30 letter that the answers were deficient, defendants agreed in a May 23 letter to supplement certain

interrogatories starting on or before June 6, 2003. Those supplemental answers did not come until September 12—after plaintiffs filed [their] two discovery-related motions, and after this Court on August 7 ordered defendants to live up to their agreement of May 23. These types of delays are inexcusable.

Accordingly, plaintiffs' motion for injunctive relief is denied. Plaintiffs' motion to compel is allowed to the extent defendants have not already responded to plaintiffs' interrogatories. Plaintiffs' motion for entry of default judgment is denied without prejudice. Plaintiffs' motions for sanctions are allowed in the amount of plaintiffs' attorneys' fees and costs for preparing the two discovery motions. Counsel shall file the requisite affidavits. Defendants' motion for sanctions is denied.

_____ /s/ Rya W. Zobel

DATE RYA W. ZOBEL
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

IN RE SHELL OIL PRODUCTS CO. DEALER FRANCHISEES LITIGATION	[FILED 07/09/2004] MDL Docket No. 1461 United States District Court for the District of Massachusetts Civil Action No. 01-CV-11300 United States District Court for the District of New Hampshire Civil Action No. 01-CV-430 United States District Court for the District of Rhode Island Civil Action No. 01-CV-514T

AFFIDAVIT OF ROBERT WEINER

Robert Weiner deposes and states under oath as follows:

1. I am an attorney-at-law licensed to practice in the Commonwealth of Massachusetts. I am also a principal at the Law Offices of Robert E. Weiner, located at One Longfellow Place, Boston, Massachusetts. I was formerly counsel to the Plaintiff Lessee-Dealers in connection with the above referenced matter. Before that, I represented each of the individual Lessee-Dealers through an unincorporated association known as the United Shell Dealers of New England in a related action captioned *Tsanikilides et al. v. Shell Oil Products Company, Inc.*, Civil Action No. 00-11295 (RWZ). The statements of fact contained herein are made upon my own personal knowledge.

2. Attached hereto as **Exhibit "A"** is a true and accurate copy of a February 25, 2000 letter that I sent to

Brett Marks, Assistant General Counsel, Equiva Services on behalf of the United Shell Dealers of New England.

SIGNED UNDER THE PAINS AND PENALTIES OF PERJURY THIS 1st DAY OF JULY, 2004.

/s/
Robert Weiner

[Service Stamp 7/9/04]

Law Offices of
ROBERT E. WEINER
One Longfellow Place, Suite 5489
Boston, Massachusetts 02114
Telephone (617) 237-4283 Facsimile (617) 727-7235

February 25, 2000

Brett Marks, Esq.
Assistant General Counsel – Branded Operations
Equiva Services, Inc.
1 Shell Plaza
Houston, TX 77601

By Confirmed Facsimile and First Class Mail, Postage Prepaid

Dear Mr. Marks:

We are writing on behalf of the United Shell Dealers of New England, a group that counts a substantial majority of the Motiva retailers in Massachusetts and neighboring states as members. Specifically, we are writing with regard to the tactics employed by Motiva in relation to the leases currently being offered to our clients, as well as the content of the contracts themselves.

First, we note that there is undue pressure being placed upon the dealers to execute the contracts without meaningful review in a short time frame that leads one to question exactly what Motiva's motives are. The recent expansion in the New England area of company and contractor operated stations seems to strongly indicate[ ] that unless stopped, the carnage of Texaco dealers that occurred when the ORO concept was rolled out will repeat itself.

As you know, it is our position that several of the provisions of these new contracts violate the governing law of the dealer home state and that the release language as well as the "trial franchise upon assignments" provisions violate the PMPA. With respect to the release provision, despite the "clarification" of the meaning of the language, described by your company as an agreement to disagree, it is our position that such language is illegal and unenforceable under the PMPA and governing state law, and represents nothing more than a transparent attempt to reverse the defeat suffered by Shell and Texaco in opposing the 1994 PMPA Amendments.

Notwithstanding our protest and reservations, we have advised our clients to execute the agreements because, as noted by the New Jersey Supreme Court in *Shell Oil v. Marinello*, the dealers have no choice but to sign on the dotted line or risk losing their primary means of support for their families.

Furthermore, notwithstanding our clients[']' execution of the agreements, we are putting your client on notice that we do not waive and expressly reserve all rights and causes of actions our clients have under any and all applicable law, including those arising out of the franchise agreements that may have existed in the past. Our clients will, of course, live up to the terms of the contracts until such time that a court of competent jurisdiction determines the legality, or more accurately, the lack thereof, of the unconscionable and oppressive terms being foisted upon the dealer community.

It is regrettable that a company that we once praised for its positive dealer relations before the U.S. Congress and other legislative bodies has taken what our clients view as a 180 degree turn for the worse.

It is our hope that at some point, meaningful dialogue between those with decision making authority can occur and a win-win solution can be arrived at. Nevertheless, until that occurs, we are constrained to take all legal and political steps necessary to defend the men and women who have invested everything in their locations. Kindly direct all future communications on this matter to the undersigned.

Very truly yours,

/s/

Robert E. Weiner
Dimitri "Jim" Daskal

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 01-11300-RWZ

FRANCIS MARCOUX, ET AL.,

v.

SHELL OIL PRODUCTS CO., LLC, ET AL.,

MEMORANDUM OF DECISION

October 25, 2004

ZOBEL, D.J.

For many years, Shell Oil Company and Shell Oil Products Company (together, "Shell") maintained the Variable Rent Program (the "VRP") which allowed Shell gas station franchisees to offset monthly rents with certain of the proceeds of gasoline sales. On August 1, 1998, Shell terminated the VRP and assigned responsibility for daily operations of the franchisee network to Motiva Enterprises, LLC ("Motiva"). A substitute rent subsidy program established by Motiva continued to defray rental costs until its termination by Motiva on January 1, 2000. The elimination of these programs caused rents owed by the Shell franchisees to increase two- to six-fold and, according to the franchisees, constituted a violation of various federal and state laws. Plaintiffs in this case, the franchisees, contend that defendants Shell and Motiva endeavored to convert the gas stations into company-owned retail outlets by forcing the franchisees out of

business and thereby violated the Petroleum Marketing Practices Act ("PMPA") and several Massachusetts state laws regarding consumer protection, gasoline regulation and contract law.

Acting as an unincorporated organization, plaintiffs filed an initial claim about six months after elimination of the substitute rent subsidy program. *See Tsaniklides v. Shell Oil Products Co., Inc.*, No. 00-cv-11295. After the Court determined that the plaintiffs' organization did not have standing, the franchisees voluntarily dismissed their Complaint and filed the present action on July 27, 2001.

Defendants now seek summary judgment and have filed three separate motions. The first motion (document #216 on the docket) asserts that a subset of plaintiffs executed franchise termination agreements that include general releases of all claims against defendants, retained benefits received as a result of these releases and failed to repudiate the releases within a reasonably prompt period of time. Plaintiffs argue that they signed these releases under conditions of duress and should not be bound by these terms of release. Whether duress existed depends on the relevant facts. *See, e.g., Shell Oil Co. v. Hennessy*, 639 F. Supp. 626, 628 (D. Mass. 1986) (finding that unconscionability as "predicated on unequal bargaining power . . . must be determined on a case by case basis"). Because the facts regarding plaintiffs' claim are in dispute, this motion is denied.

In the second motion (document #225 on the docket), defendants argue that the PMPA applies only to terminations or non-renewals of franchise agreements, and that plaintiffs' franchise agreements were neither terminated nor non-renewed. Defendants argue specifically that they extended the franchise agreement with plaintiff Stephen Pisarc[zy]k and did not terminate or non-renew

this relationship. As the First Circuit has recognized the theory of constructive termination under the PMPA, whether the elimination of rent subsidies following Shell's assignment of the franchises to Motiva constitutes constructive termination depends in part on resolution of certain facts presently in dispute. *See Riverdale Enterprises Inc., et al., v. Shell Oil Co*, 41 F. Supp. 2d 56, 61-62 (1st Cir. 1999) (stating the factors that a franchisee must establish in order to show constructive termination). Defendants' additional argument for summary judgment against plaintiff Three K's similarly relies upon facts in dispute regarding the appropriate interpretation of Mr. Abdul Kafal's testimony on behalf of Three K's. Accordingly, the second motion is denied.

Defendants' final motion (document #262 on the docket) identifies several grounds for summary judgment. The first ground opposes plaintiffs' Counts III through VIII on the basis that the PMPA preempts the state law claims asserted in these Counts. The First Circuit has taken a restrictive view of the PMPA preemption clause as preempting only those state statutes that interfere with a franchise termination "that would otherwise be valid under the PMPA." *Esso Standard Oil Co. v. Dept. of Consumer Affairs*, 793 F.2d 431, 434 (1st Cir. 1986). For example,"[s]tate regulation that may affect the profitability of a non-terminated franchise, but does not preclude the franchisor's ability to terminate the franchise relationship, is outside the sphere Congress sought to occupy in enacting the PMPA." *Esso*, 793 F.2d at 435. Although defendants argue that the state statutes cited by plaintiffs in Counts III through VIII are "intimately bound" with the grounds alleged for constructive termination, defendants do not demonstrate how these stat-

utes actually qualify franchisors' rights to terminate or non-renew as permitted by [the] PMPA.

Defendants next challenge the timeliness of plaintiffs' claims as based on underlying events that fall outside the permissible time frame for statute of limitations under the PMPA. This Court previously observed that "[v]iewing the facts as stated in the Amended Complaint in a light most favorable to the plaintiffs, the statute of limitations for the PMPA claims began to run on January 1, 2000." *Marcoux v. Shell Oil Products Co., Inc. and Motiva Enterprises, LLC*, 2002 WL 31256197, *1 (2002). It is unclear why defendants continue to raise this argument. The third motion also argues that the termination agreements executed by certain plaintiffs comply with the PMPA requirements for legal termination of a franchise relationship and thus should be treated as valid, binding terminations. As noted with respect to defendants' first motion, whether the certain plaintiffs executed these termination agreements under circumstances of duress remains in dispute. Regarding plaintiffs Three K's and Stephen Pisarczyk, however, defendants observe that the termination agreements in question were executed in 1999, before occurrence of the events in January of 2000 giving rise to this lawsuit. Plaintiffs have not demonstrated how the allegations of duress for these two plaintiffs might be tied to the events underlying this lawsuit. Summary judgment is thus granted as to these two plaintiffs.

Accordingly, defendants' third motion for summary judgment is allowed as to plaintiffs Three K's and Stephen Pisarczyk. The remaining motions are denied.

_____ /s/ Rya W. Zobel

DATE RYA W. ZOBEL
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

No. 1:01-CV-11300-RWZ

FRANCIS MARCOUX, et al.,
Plaintiffs,

vs.

SHELL OIL PRODUCTS, et al.,
Defendants.

Tuesday, November 16, 2004 (Day II)

---

* * * * *

[5] CYNTHIA KAROL

* * * * *

[6] Q. * * * [W]hat is your occupation and what's your husband's occupation?

A. I operate the service station located on Pleasant Street in Attleborough and my husband works for the commuter rail.

* * * * *

Q. And the service station that you refer to, is that a Shell station?

A. It is a Shell-owned location.

* * * * *

[24] Q. Who did you meet with?

A. Dennis Neilson.

Q. And what did Mr. Neilson say to you?

THE COURT: Who was Mr. Neilson?

THE WITNESS: That's what I was just explaining.

A. Dennis was a territory manager, I believe. That was his title. I know that he was above my territory sales representative, who was also present and in and out at that time.

* * * * *

Q. What did you say to him and what did he say to you?

A. During a rent increase, I was concerned, and I mentioned to him that it does say that they could terminate the VRP. I [25] said, "If the VRP were terminated, I could never pay those rents." Now, looking at the rents, as I had operated previously, I would quickly view that list up and down and think—

Q. What did he say to you?

A. I was thinking I was going to pay about a third, not the entire thing.

* * * * *

Q. What did you ask Mr. Neilson, if anything, about the Variable Rent Program at the time you signed this?

A. I asked, "Do I have to worry about the Variable Rent Program ever being terminated?"

Q. Why did you ask him that?

[26] A. Because I had gone into Shell expecting to pay somewhere around $1,100 total rent, net rent. That's what my expectation was. I did realize inflation comes along and things raise. Even after paying a third of that increased list, I'm still looking at almost double rent. So I certainly wouldn't want to go much above that. I had to count on the fact that the VRP is going to be in place.

Q. So prior to your getting your first lease, you were paying roughly somewhere less than $2,000 in rent?

A. Yes.

Q. Okay. And then the first lease says your rent is going to be $6,350?

A. Right. So I needed to know whether I was looking at about a third of that, in actuality. That's what I needed to confirm. And having so many years ahead, month by month—

MR. BENNER: Objection.

THE COURT: Hold it, Ms. Karol. So [that's] what you said to him and then what did he say, if anything?

A. He said the VRP would never be discontinued. It's not going anywhere. That doesn't mean anything. If it did, it would put all the dealers out of business and Shell couldn't possibly run all these operations at once. That was said to me and I remembered it over and over again as the years followed.

* * * * *

[27] Q. Did you believe what he told you?

A. I completely, confidently, believed what he told me.

Q. And did you sign the lease or what did you do in reliance upon what you were told?

A. I signed the lease and I proceeded, in the following years, to try to grow my business, to try to grow the garage business, to spend money, and to expect—in expectance that the rent was affordable, I did spend other money trying to grow the business.

* * * * *

[49] Q. Ms. Karol, you continue to own and operate the Shell station today?

A. Today, I do.

* * * * *

[50] Q. * * * And how have you been able to continue—and you've been paying the rent since 2000?

A. Yes, I have.

Q. And how have you been able to—

A. Well, for one thing, my next lease came in slightly lower.

Q. In terms of what you were paying in 2000?

A. Right.

Q. That was after you got involved with a lawyer?

A. Yes.

Q. Okay. And was it after a lawsuit was filed?

A. Yes. At that time, when I received the new lease, I also asked, as you can see, the first sentence in my letter that I wrote to them, I asked what the new lease looks like. I wanted to know ahead of time. I didn't want to know the day that I signed the lease. I wanted to know ahead of time so that I could know if we had to move, if we had to bail out, if I had to file bankruptcy.

* * * * *

[52] Q. * * * I've put on the screen a chart showing the gallons that you've sold, you know, since 1997. Ms. Karol, um, just generally in the last few years, has your—the amount of gasoline that you sell been impacted by the rent that you're paying?

A. Yes, I believe it's had an impact.

Q. And how has it had an impact?

A. I think that the higher the price of gasoline, you make less money. And when you make less money, it's harder

to pay the rent. And I do have a need to make more money. And also, even just the changes in credit cards have been phenomenal.

* * * * *

[66] Q. Do you own this business as a sole proprietorship?

A. Yes.

Q. It's not a corporation?

A. No.

Q. And therefore, have you personally borrowed or taken monies and put it into the business in order to maintain the business over the last three or four years? * * * What is the magnitude of your own personal funds since the elimination of the rent subsidy program?

* * * * *

A. Um, home equity loans in excess of $50,000. I have a loan with Bristol County Savings for $20,000. $15,000 at Citizens Bank. Along with that, putting in CDs and IRAs and all sorts [67] of things where I've borrowed money from my children and paid that back. Just living month to month where [I can] get the money at this time, honestly.

* * * * *

THE COURT: How much money did you borrow to put into the business?

* * * * *

A. Total borrowed is in excess of $100,000.

Q. And did some of those funds come from—did you also have to cash any retirement funds?

* * * * *

A. Yes.

* * * * *

Q. And what is the magnitude of those funds that you put into the business?

* * * * *

A. I think about—altogether from the beginning, about $40,000.

* * * * *

[85] CROSS-EXAMINATION BY MR. BENNER:

* * * * *

[86] Q. Ms. Karol, let me represent to you that this is a summary that's been prepared of you[r] statement of income and expenses for the year 1994 through 2003 based upon the financial statements that you submitted to us. And so what I would like to do first is cover the issue of net income. * * *

You note that in 1994, your net income was $60,112?

A. Yes.

Q. And that's the amount that was left over after the operation of your station for your own purposes, your own use, correct?

A. Yes.

Q. And that was the last year prior to you taking the station over for yourself, correct?

A. Yes.

Q. And that was when you operated the station together with your husband?

A. Yes.

Q. The first year that you operated the station on your own was 1995, correct?

A. Yes.

[87] Q. And the net income for that year was $30,446, do you see that?

A. Yes. Yes.

* * * * *

Q. So the year you took over the operation, your net income dropped in half, correct?

A. Uh-huh.

Q. And you testified earlier to a valuation of your business at the time of your divorce. I assume the valuation of the business included what net profit the business earned in 1994, correct?

A. Uh-huh.

Q. So to the extent that the net profit of the business was less in later years, the value of the business would go down, correct?

A. Correct.

Q. Okay. So in 1995, you earned a total of $30,446. In 1996, a total of $25,710. In 1997, a total of $28,832. And that was the last year before the VRP was actually terminated—last [88] full year before the VRP was terminated in 1998, correct?

A. Correct.

Q. And the year that the VRP was terminated, you earned $29,000 in 1998. In 1999, you earned $39,683. And that was the year that the STIP program was in?

A. Correct.

Q. And you considered that—you testified that you were dissatisfied with the STIP programs during your direct examination; did you not?

A. Correct.

Q. But your income went up by $14,000 in '99; did it not?

A. Correct.

Q. Okay. And then in 2000 which is the year that you say was a difficult year, your income was $8,188?

A. Correct.

Q. But this actually shows that the business, although I agree, I recognize that the income went down, there was a net income out of the business, there wasn't a loss that was shown by the business in that year, correct?

A. Correct.

Q. Okay. As we go forward to 2001. We go back to $38,568 as your net income. And then 2002, $22,952; and 2003, $28,932. Now, what I would next like to focus on—so let me just ask. You would agree with me, would you not, that your net income in 2001 when you were paying the new rent was actually greater [89] than any of the years during which you operated the station on your own prior to 1998, correct?

A. Correct.

* * * * *

[113] Q. Okay. If I could have the last page of the diary, please. Now, could you tell from the top entry which is not complete, could you tell from the top entry when it is that this entry was made? And this page looks like it would have been in the year 2000.

A. Yup, the end of 2000.

Q. The end of 2000. And is it true that in the last entry in your diary at the end of the 2000, it says, "I stopped writing because the new lease looked lower and gave

hope, also busy, also treated better due to lawsuit maybe"?

A. Yes.

Q. So at the end of 2000, it was your belief that there was hope because the lawsuit—because the rent was lower?

A. Right.

Q. And you were being treated better?

A. On that particular day in time for a brief moment and off and on, I did have hope because I was an optimistic person.

* * * * *

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

No. 1:01-CV-11300-RWZ

FRANCIS MARCOUX, et al.,
Plaintiffs,

vs.

SHELL OIL PRODUCTS, et al.,
Defendants.

Tuesday, November 16, 2004 (Day II)

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* * * * *

[140] JOHN SULLIVAN

* * * * *

[141] Q. When did you—at some point in time, did you get involved in the gasoline business?

A. Um, February 1970, I entered a station on Front Street in Scituate as an Atlantic Richfield dealer. I operated it from February 1970 to approximately February 1985 when Shell Oil Company took it over, they purchased Atlantic Richfield.

* * * * *

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Civil Action No. 01-11300-RWZ

FRANCIS MARCOUX, et al.,
Plaintiffs,

vs.

SHELL OIL PRODUCTS CO. LLC, et al.,
Defendants.

TRANSCRIPT OF JURY TRIAL
DAY THREE
November 17, 2004

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* * * * *

[4] (John Sullivan, previously sworn, resumed stand.)

* * * * *

[11] Q. On occasion did you receive writings from Shell which indicated in the words that Shell was reserving the right to terminate the VRP on certain notice periods?

A. That would be on the threshold payment they mailed to you [12] and delivered to you once a year. That would be on the document with your threshold gallons, I believe.

Q. What do you recall the documents saying with respect to Shell's ability to end the rent subsidy program?

A. That Shell could do away with it with a 30-day written notice.

Q. Did you ever discuss that 30-day notice with any of the Shell representatives as far as what that meant?

A. Yes.

Q. And [with] what Shell representatives did you have [a] discussion on that subject?

A. Bill McCollum, Heidi Massey, Greg Woolf.

Q. And these were representatives of Shell that serviced your area over a period of years; is that right?

A. Yes.

Q. And what did they say to you concerning the 30-day notice period?

A. The main bulk of the conversation was don't worry about it, they'll always have something like it because the rent subsidy is a viable part of their way of doing business with the selling of gasoline. And if they did away with that, they'd have to put something in its place because Shell knew very well that half the dealers would be out of business within a year.

Q. They told you that?

A. Yes.

[13] Q. Okay. And during what period of time were you told that?

A. Probably from the 90's, to the mid to late 90's.

Q. Did you ever inquire as to what this 30-day notice period referred to?

A. I pretty well understood it but they elaborated on it.

Q. What did they say to you about—

A. They'd only do that if there was a war or an embargo or a gas shortage, something drastic along that lines. A war.

Q. So that's what they explained that that—

A. That's why they put that 30-day notice in there.

Q. Who at Shell told you that that 30-day notice would only apply if there was a war or oil embargo?

A. The representatives I just spoke of.

* * * * *

[19] Q. Was there a new lease presented to you in calendar 2000, Mr. Sullivan?

A. Yes.

Q. And when you got that new lease, did you look at it?

A. Yes, I did.

Q. And when you looked at it, what did you observe?

A. That there was a tremendous amount of change in the way Shell was going to start doing business and Motiva was going to [20] start doing business with us, where we never had a triple net lease before. We had to pay for maintenance, real estate taxes and the fair market—so-called fair market value of the property.

Q. Keep your voice up. Were there other changes that you saw in the new lease document?

A. There was no rebate program offer whatsoever.

* * * * *

[21] Q. Mr. Sullivan, on the screen is—

* * * * *

Q. It's a letter to you from Motiva dated April 27, 2000, in which it indicates that Motiva Enterprises LLC has received an executed retail facility lease and retail sales agreement that appear to alter or to require alteration in the future of the terms of the RFL and RSA, or to re-

serve your right to challenge the enforceability of the RFL and RSA. Company does not accept these terms.

Did you at the point when you got the lease in 2000 raise some objections to Motiva about certain terms of the lease?

A. Yes.

* * * * *

Q. You had been a dealer at this time since 1985 for Shell; is that right?

A. Yes. I was a Shell dealer from 1985, and from 1970 at the same site I was an Atlantic Richfield dealer.

Q. And they wrote in the letter: Your failure to return an unaltered copy of this RFL and RSA within ten days of your receipt of this letter will be the basis for issuance of a notice of nonrenewal under the PMPA. Please note that this [22] letter is not a notice of nonrenewal under the PMPA.

* * * * *

Q. Was there any negotiation with respect to the 2000—the lease and the appeal supply agreement that was provided to you in calendar 2000?

A. Just one.

Q. What was that one?

A. You had the right for reappraisal of the property.

Q. And, in fact, you exercised that right; is that right?

A. Yes, I did.

* * * * *

[34] Q. Now, at some point—after the new lease was signed and the rent—and the reappraisal and the rent

was approximately— * * * did you try to continue to operate the business?

A. Yes.

Q. And what was the result[ ] of your attempts to continue to operate your business?

A. It was harder to make the adjustments. And one of the main contributing factors was, in my opinion, in my situation was the mental anguish.

* * * * *

[35] Q. The new rent, the new increased rent, did that cause any difficulty for you?

A. Yes.

Q. And how?

A. It caused twice—on two things. It was more money than I was paying and you could only make so many—you know, 10, 11, 12 cents a gallon. And the credit card business was picking up, and your income was going down because the credit card fees were going up percentage-wise. So instead of making 10 cents a gallon, you might have been making 5 cents a gallon on a credit card basis and half your business was credit cards.

[36] And then you had to get used to paying the real estate taxes and the maintenance. In 1999 when Motiva or Shell, whoever it was was paying us, they were paying us I believe it was $450 a month for the maintenance of the building. So we fixed things up ourselves, paint them and take care of the little things. And in the year 2000 when it was turned around, it was no longer 450. I believe it was 950 or 980 a month. It went from them giving us 450 to us giving them 980. And it was all these little things that it became a nonfriendly business atmosphere whatsoever.

* * * * *

[41] Q. At some point in time did you determine that you couldn't continue on, sir?

A. Yes.

Q. And did you contact Shell?

A. Yes.

Q. And who did you contact at Shell?

A. Greg Woolf.

Q. And what did you say to Mr. Woolf?

THE COURT: When was this, Mr. Sullivan?

THE WITNESS: I believe it was in April of 2000.

A. I told him I was going to leave the station, see if he wanted—see if he knew anybody that wanted to buy it.

Q. Did you ask him whether Shell was interested in buying it?

A. I didn't care as long as somebody bought it. I wanted to get somebody—out of there because I knew mentally I couldn't go on any further with this oil company and I was at my wit's end.

* * * * *

[42] Q. And at some point in time did you communicate with Shell that you had a potential buyer for your station?

A. Yes.

Q. And had Shell expressed any interest in buying your station—putting aside what they offered in 1986—in 1999, 2000 up to this time, had Shell expressed any interest to you in paying money for your station?

A. No.

* * * * *

Q. Is this a letter that you sent to Motiva in August of 2000?

A. Yes.

Q. Okay.

* * * * *

Q. And this says: I'm informing you that as of September 30 my lease is being sold to Chris Azizian of Hanover, Mass. for $25,000 and gas inventory. Relative to the property, if Motiva wishes to express their right of first refusal, I will turn the [43] location over to Motiva or Chris Azizian.

I thought you said before that prior Mr. Azizian had contacted you as of—in April?

A. I can't remember the exact time. Shell Oil Company sent them down or Motiva sent them down.

Q. Why'd you send this letter to Motiva?

A. To inform them officially that I had a buyer for the business. I was going to sell it to him.

Q. And Motiva sent you a—one of the reasons was you wanted to give them right of first refusal?

A. Correct.

* * * * *

Q. Motiva on September 13th wrote you back indicating that they had received your notice and please be advised that Motiva hereby elects to exercise its right of first refusal to purchase the interest in the franchise. This letter confirms Motiva's agreement to be bound by all the terms and conditions of the agreement of sale between you and Chris Azizian. In view of Motiva's exercise of its right of first refusal, we do not intend to review Chris

Azizian as a potential retailer of this retail outlet. Please execute and date two copies of this letter. And it goes on.

You signed this letter as well as Motiva; is that right?

[44] A. Yes.

* * * * *

Q. * * * And at some point in time, did you go to Motiva to—or have a meeting with anyone from Motiva to pick up your check for $25,000?

A. Yes.

Q. And when was that?

A. The day I seen the check was October 9th.

* * * * *

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Civil Action No. 01-11300-RWZ

FRANCIS MARCOUX, et al.,
Plaintiffs,

vs.

SHELL OIL PRODUCTS CO. LLC, et al.,
Defendants.

TRANSCRIPT OF JURY TRIAL
DAY THREE
November 17, 2004

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* * * * *

[103] AKMAL MOA[W]ED, SWORN

* * * * *

[105] Q. You currently operate a Shell-branded gasoline station; is that correct?

A. Yes, I do.

Q. Where is that located?

A. It's located at the corner of West Broadway and D Street in South Boston, which is 302 West Broadway, South Boston, Mass.

Q. And how long you have been at that station, sir?

A. Twenty-three years.

Q. Have you always operated the station as a Shell-branded gasoline station?

A. When I started the business, I was an Arco dealer. And in 1985 Shell bought the interest of Arco, so I became a Shell dealer and then a Motiva dealer.

Q. Have you been a Shell or Motiva dealer since 1985 continuously?

A. Yes, sir.

* * * * *

[116] Q. The lease that you signed in 1998 with Mr. Parkman lasted for five years. * * * After the lease that expired, the lease that you signed in 1999, after it expired, did you come to sign a new lease with Motiva?

[117] A. Yes, I signed the lease with Greg Woolf for the year starting 2004. Three-year lease.

* * * * *

[129] Q. Mr. Moawed, in this lawsuit are you claiming that the increased rents that you've been paying since the elimination of the STIP have caused your business, your Shell business, any harm?

A. Yes.

Q. And could you tell us what that harm is, please.

A. The harm reflects on my street price, my street price is higher because of the rent being higher, and my cost on the [130] tank wagon is higher. So my street price is higher. I have less traffic of people coming to my location and I'm losing revenues.

* * * * *

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Civil Action No. 01-11300-RWZ

FRANCIS MARCOUX, et al.,
Plaintiffs,

vs.

SHELL OIL PRODUCTS CO. LLC, et al.,
Defendants.

TRANSCRIPT OF JURY TRIAL
DAY FOUR
November 18, 2004

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* * * * *

[4] (Akmal Moawed, previously sworn, resumed stand.)

* * * * *

[5] CONTINUED CROSS EXAMINATION

* * * * *

[20] Q. Let me show you your financial—a summary of your financial statements for certain years. Now, Mr. Moawed, I can [21] let you know that this is a summary of information that we have taken from your financial statements for the years 1994 to 2003.

And you indicated in response to an earlier question with respect to the VRP threshold and how your business was doing that your income was going up. But, in fact, what this chart shows is that from 1994 to 1998, your net income bottom line was actually going down, was it not?

A. Right.

Q. And then from 1998 to 2003, your net income went up really quite a lot, correct?

A. Correct.

Q. And at the same time you were drawing—you're a corporation and you were drawing an officer's salary, which if you add to the net income, for example, in 2001 indicates that net income plus officer's salary for that year was about $121,000, correct?

A. Correct.

Q. As opposed to net income plus officer's salary in 1997, the year before the termination of the VRP, of about $34,000, correct?

A. Correct.

Q. What we've also done, Mr. Moawed, is taken your gross profit as reported on your financial statements, and for the benefit of the jury if it's difficult to read, the gross profit [22] line beginning in 1997 is 205,000; '98, 205,000; '99, 232,000; 2000, 327; 2001, 353,000; 2002, 362; and 2003, 327. If we deduct your rent from that number as you reported on that chart that you introduced in evidence yesterday, we get the numbers that are shown on the line gross profit minus rent. And rather than read those numbers, what we've done is we've created a chart that shows that in 1997, your gross profit minus rent was in fact $167,000, which is a little bit more than 150. And then in 2001, it actually goes up to $247,000.

And so am I correct that after your sales and after your cost of sales when you have your gross profit, that's the amount of money you have left over to spend on your business, correct?

A. Correct.

Q. And then after you paid your rent from 1997 to 2002, the amount you had left over actually went up, correct?

THE COURT: 2001—through 2001?

Q. Through 2001, it went up above where it was in 1997?

A. I explained that yesterday in my cross-examination that I had a unique situation with the diversion of the traffic to South Boston when they first opened the Ted Williams Tunnel. However, these numbers can be manipulated any way you like. If you make a chart and see what's the relation between my profit from the gas or between my rent to my gallons sold, you can see that my rent now is about 20 cents on every gallon of gas I'm [23] selling. So charts are statistical things that an educated guy can manipulate in any way to serve his purpose.

Q. Okay. But your net income is your net income, correct?

A. My net income is my net income. My net income increased because of the diversion of the traffic to South Boston from the Big Dig project, and that was a temporary thing I testified to yesterday and this is the fact.

Q. And that allowed you to make a lot of money during that period?

A. That's okay.

* * * * *

[26] Q. With respect to the revaluation in 19—in 2003, you testified yesterday that you did not seek a reappraisal?

A. I seek the reappraisal but I withdrew my request.

Q. I'm sorry, I didn't understand the answer.

A. I seek the reappraisal. I filled the form[out] and I send it to Shell, and when the process was explained to me, I seek not to use it. I didn't think it's fair.

Q. Okay. In fact—in fact, you didn't pursue the reappraisal because in conversation with Shell—a Shell representative, you determined that the appraisal price was fair, correct?

[27] A. The appraisal price is not the issue. The issue is the way the appraisal is conducted, the way I am picking an appraisal over the phone, just somebody's name that I don't know anything about. And I don't have any right other than just paying his fees. And this person will be working for Shell, instructed by Shell, contracted by Shell as a matter of fact.

Q. But you thought the number that you learned from Shell to be the value that they appraised the station for, you thought that was a fair number, did you not?

A. As far as a piece of real estate?

Q. Yes.

A. I think that that's about right.

Q. So you were told, which you didn't indicate in your testimony yesterday, you were told by the Shell representative—in fact, you asked the Shell representative if the station were a certain—valued at a certain amount of money, would that cause my rent to go up or down?

A. Correct.

Q. And the certain amount of money was the value that you thought the station was worth, correct?

A. Correct.

Q. And what was that number?

A. About a million one to a million two.

Q. And you thought that was the value of the real estate and equipment and building at your station?

[28] A. Correct.

Q. And you have knowledge of the real estate industry in Boston, do you not, Mr. Moawed?

A. I have some knowledge.

Q. In fact, you're in the real estate business, are you not?

A. Yes, I am.

Q. Okay. So you had the ability when you understood—when your property was being reappraised in 2002, you had the ability to have a sense of what the value was worth, correct?

A. Correct.

Q. And you thought it was about a million to a million two?

A. Yes, sir.

* * * * *

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Civil Action No. 01-11300-RWZ

FRANCIS MARCOUX, et al.,
Plaintiffs,

vs.

SHELL OIL PRODUCTS CO. LLC, et al.,
Defendants.

TRANSCRIPT OF JURY TRIAL
DAY FIVE
November 19, 2004

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* * * * *

[81] FRANCIS MARCOUX, SWORN

* * * * *

[82] Q. Mr. Marcoux, you currently operate a Shell branded gasoline station; is that correct?

A. Yes.

Q. How many, sir?

[83] A. Two.

* * * * *

Q. Where are those two locations, please?

A. Webster, Mass. and Southbridge, Massachusetts.

Q. With regard to the Webster location, how long have you been there?

A. I grew up there. My dad had it. I took it over, and I took it over for him in 1975.

* * * * *

Q. And there's a second location in Southbridge, [84] Massachusetts, correct?

A. That's correct.

Q. And you acquired that in 1978?

A. Yes, that's correct.

* * * * *

[95] Q. We talked earlier in your testimony regarding the leases that you signed for the gasoline station. At some point in time after the formation of Motiva, were you presented with a Motiva lease for each of your gasoline stations?

A. Yes.

Q. And did those leases contain any sort of rent subsidy programs?

A. No.

Q. How did the rents that were going to be charged under your Motiva lease compare to the rents that you were being charged when Shell had its variable rent program in effect?

A. It was significantly higher.

* * * * *

[98] Q. And what year do you recall, sir, at your Southbridge location, what was the first year of your Motiva lease?

* * * * *

A. October 2001.

Q. So, in fact, your rents with the Motiva lease as compared to the rents you were earning with the STIP went down a little bit?

A. Yes. Looks that way.

Q. And this year you anticipate based on your current lease that you're going to spend $62,000 approximately for rent in Southbridge?

A. That is correct.

Q. Let me show you, please, a similar chart for your Webster location and ask you, to your knowledge, whether that accurately reflects the amount of rents that you paid for the years shown?

A. It looks that way.

Q. And at your Webster location, what was the first year that you received a Motiva lease?

A. Same time frame. They were—almost the same time frame.

Q. That would be 2001?

[99] A. October 2001.

Q. And, again, at this Webster location your rents went down?

A. That's correct.

Q. But compared to the rent that you were paying when the VRP was in effect, your rents were higher; is that correct?

A. It looks like two to three times.

Q. We heard some testimony this morning regarding a rent challenge that was available under the Motiva leases. Were you familiar with that?

A. Yes, I was.

Q. And do you have an understanding as to how that process worked?

A. I do.

Q. Could you explain it to the jury, please?

A. Sure. They had—you got proposed a package with the lease, and the rent figures were established on some sort of appraised value that they had, their appraisal. You had the option if you filled out a letter and gave it within a 30-day window, gave them notice that you would wish to—to have it reappraised, you could. If you exercised that right, they in turn came out and offered you a choice of three of their chosen appraisers. And you at that point in time you pick one, a short time later supposedly that you would get an appraiser to come out and he would appraise or she would appraise your property.

[100] Q. And at the time you were presented with your Motiva leases in 2001, did you exercise your option to do a reappraisal?

A. I did.

Q. What were the results of the—insofar as your rent was concerned when you exercised your right of reappraisal?

A. One station went up a little bit, and one station went down a little bit.

Q. Did you eventually, sir, did you sign the Motiva leases for both locations?

A. Yes.

Q. And did you make any notation on your lease?

A. I signed under protest.

* * * * *

[115] Q. You indicated, Mr. Marcoux, that you've sustained damages in this case, yet your companies are still in operation; is that correct?

A. That's correct.

Q. Can you explain to the jury how it is that you're continuing an operation?

A. Yes. I have a really good repair business. I've worked all my life in that area, and it's a strength of mine and I utilize another building that I have with it and it all falls under the umbrella of MAC['s] Shell. We use the facility in the building behind. We developed a towing business to a larger degree than we used to have and I have—I've generated a tremendous amount of income through repairs.

Q. What about with regard to sales of gasoline? Are you generating profits there, sir?

A. Pretty minimal nowadays.

* * * * *

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

C. A. No. 01-11300-RWZ

FRANCIS MARCOUX, et al.,
Plaintiffs,

vs.

SHELL OIL PRODUCTS CO. LLC, et al.,
Defendants.

TRANSCRIPT OF JURY TRIAL
DAY 6
November 22, 2004

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* * * * *

[3] FRANCIS MARCOUX, Resumed
CROSS-EXAMINATION, Continued

* * * * *

[23] Q. The last chart I want to show you has to do with dealer income, both compensation to you and net income from the business.

* * * * *

[25] Q. Mr. Marcoux, let me represent to you that, again, from the financial statements that you provided from Ma[c's], the [26] company is called Ma[c's] Shell Service, Inc.; is that correct?

A. That's correct.

Q. And the financial data for Ma[c's] Shell Service, Inc., includes all of the revenues in the two service stations and their ancillary operations; is that correct?

A. That includes the house that I have and the income generated from the towing company also.

Q. So, the—

A. Which are not owned by Shell in any way, shape or form.

Q. So, the businesses, if you will, that are included within Ma[c's] Shell Service, Inc. include the operations at the Webster station?

A. That's correct.

Q. The operations at the Southbridge station?

A. That's correct.

Q. Your towing business?

A. That's correct.

Q. And I'm not sure I understand this fourth one.

A. I have a residential house that Ma[c's] Shell owns.

Q. A residential house?

A. Yeah, Ma[c's] Shell bought it. It's on the asset books. We own it.

Q. Do you rent it out?

[27] A. Yes, we do.

Q. To a family?

A. Yes.

Q. And how much rent do you get from that?

A. $7200 a year.

Q. $7200 a year. Any other income from that?

A. Not from the house, no.

Q. Or from that—do you have a way of referring to that house? Does it have a company or a designation or description?

A. We just throw it in. It's just part of Ma[c's] Shell.

Q. Okay. So, within that company you've included that house. Do you take depreciation on it?

A. I'm sure, whatever the accounting standard practices are. I think houses are 33 years, but it's only on the building. You can't depreciate the land. The land, I bought it because I was going to move part of my commercial business there. It's a commercial piece of property. It has a house on it.

Q. Other than the $7,000 a year in rent, there's no other income you receive from that residential property?

A. That's correct.

Q. What about the towing business, what does that consist of?

A. Three trucks.

[28] Q. Where are those trucks kept?

A. At the building behind the station.

Q. Is this on land owned by Shell or by you?

A. It's controlled by me.

Q. By control, is it leased from Shell?

A. No, I lease it from the same landlord that Shell leases the Shell station from.

Q. And you pay rent to that landlord?

A. I do.

Q. Do those trucks bring cars into the service repair bays?

A. On occasion, yes, they do.

Q. Are there repairs done as a result of your towing business?

A. That is correct.

Q. And they're done at your service bays?

A. Sometimes the service bays, we do some stuff outside on the tarmac. It depends when it is, what time of year it is.

Q. Who takes care of those trucks?

A. We do.

Q. Employees of Ma[c's] Shell Service Station?

A. Yes, that's correct, I'm sorry.

Q. Do those people, do they also work, this is all at the Webster location?

[29] A. That is correct.

Q. And do they do other work at the Webster location?

A. Yes, they do.

Q. Do they work in the repair bays?

A. Yes, they do.

Q. Do they receive a salary?

A. Yes, they do.

Q. And they generate income from their work at the repair bays?

A. Yes, they do.

Q. Do you have any separate employees that only work on the towing business?

A. No, I don't.

Q. What would you estimate the income from your towing business is?

A. 120,000 a year.

Q. And about how long have you had the towing business?

A. We've had it for quite a while, but we've changed it. We added a truck back in—we added one in '97, '98, so then we added another one in 2000.

Q. It started in '97 with a first truck?

A. No, I'm sorry, I'm thinking of the new vehicles we had.

Q. I see.

A. The 2000 truck was bought in the year 2000. We had an [30] International flatbed. We bought that.

Q. So, prior to 2000, you had two trucks and then in 2000, you acquired a third one?

A. That's correct.

Q. And the income starting in 2000, has that been about 100,000 to 120,000 from 2000 to the present; is that a fair estimate?

A. I think that would be fair, yeah.

Q. And you have some expenses in it in terms of leasing, having to pay rent to the landlord for that portion of the property, that tarmac area you described?

A. I don't think I follow you.

Q. Are there some expenses you have in connection with the towing business?

A. Maintenance of the trucks.

Q. Okay. And purchase of the trucks?

A. Yeah, they're in Ma[c's] Shell, they're an asset.

Q. So, Ma[c's] Shell bought the trucks?

A. That's correct.

Q. How much time do you spend on the residential business?

A. It's probably, you know, same kind of deal as once a tenant, I had one tenant in there for eight and a half years, no, eight years, eight years. Jason just left so we had to put a roof on it and some flooring and replace a [31] couple windows, but that's been it for eight years.

Q. How many hours a month or a year?

A. Collect a check, put it in the bank.

Q. Okay. With respect to the towing business, how much time do you spend on that?

A. It's part of my Ma[c's] Shell hours, I would think.

Q. So, that was included in the 30 to 60?

A. 30 to 60, yeah.

Q. It wasn't included in the 5 to 10?

A. No. I think you said you wanted up front hours versus back hours.

Q. All right. Let's look at your compensation then from these four businesses. In 1994, it was about $114,000, and this was taken, let me represent to you, from your financial statement, and in 1994, you didn't have your towing business, or did you?

A. I think I did. I had my truck, yes, sir.

Q. Okay. This was a separate line item on your financial statement called officer or maybe even Mr. Marcoux compensation. Do you recall that?

A. Yeah, I would think it's a salary column. If that's what you're referring to, I think that's what you've referred to.

Q. That's exactly what I'm referring to, yeah. So, for collecting your check from your tenant, operating the one

[32] truck and the two businesses, your compensation is about 114,000 in 1994; is that correct?

* * * * *

A. Yes.

Q. Is it fair to say that the overwhelming activity for which you were getting compensation during this time period was managing your two service stations?

A. That would be fair, yes.

Q. Moving down through the years, 1998, it went up to about 150,000; 1999, about 160,000; 2000, 150,000; and it dropped down for a couple years in 2001 and 2002 to about 100,000 and then 2003, it was 157,000, and based on the reports you've produced for this year, the analyzed number looks about 78,000. Do you see that?

A. Yes, I do.

Q. Then there's a net income column, and let me represent to you that that was the number at the bottom of the financial sheet for your business, for these four businesses for each of these years. Okay?

A. Yeah.

Q. And they move around, they go up and down, there are a couple years where they're actually negative and then for 2003, it's about 54,000 or 55,000, and for this year on an [33] analyzed basis, it looks like it's going to be about 115,000. Do you see those numbers?

A. Yes, I do.

Q. All right. What I want to do then is really get to the last column, which is the total. Are you the owner of Ma[c's] Shell Service, Inc.?

A. I'm the president, yes.

Q. Are you 100 percent owner?

A. Yes, I am.

Q. So, you would be entitled to the net income at the end of the year; is that correct?

A. That's correct.

Q. So, if we add your direct compensation, your salary and your net income, that's what's reflected in that last column?

A. That's correct.

Q. And let's see, 1997, the last year of the VRP, it was about 150,000, 160,000; 1998, it went up to 200 and then if we look going forward from 1999 and 2000, it's 200,000, I guess, with the exception of 2002 was about 152,000. Do you see those numbers?

A. I do.

Q. So, if we were to take the last five years, which is the very bottom row there for 2000 to 2004, your compensation either directly or through the net income of the business [34] has been over a million dollars; is that right?

A. That's correct.

* * * * *

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

C. A. No. 01-11300-RWZ

FRANCIS MARCOUX, et al.,
Plaintiffs,

vs.

SHELL OIL PRODUCTS CO. LLC, et al.,
Defendants.

ORAL AND VIDEOTAPED DEPOSITION OF
EUGENE GOLL
January 7, 2004
[Played at Trial November 22, 2004]

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* * * * *

[4] EUGENE GOLL

* * * * *

Q. * * * [A]re you employed, sir?

A. Yes, I am.

Q. And by whom are you employed?

A. I'm employed by Shell Oil Products U.S.

Q. And for how long have you been employed by Shell Oil Products U.S.?

[5] A. I am entering my 30th year of continuous employment with Texaco, Star Enterprise, TRIME (phonetic), Equilon, and now Shell Oil Products U.S.

* * * * *

Q. And what is your position with Shell Oil Products?

A. I am currently the operations manager for the national wholesale group.

* * * * *

[88] Q. The goal, if I understand it, was—one of the goals of the plan was to reduce the number of franchisee [89] lease dealers?

A. The—I cannot agree with that comment. Okay?

Q. It wasn't—that wasn't a goal, to reduce the number of franchise dealers?

A. Franchise dealers represented the largest portion of the retail assets. The goal of the plan was—from a network and a market point of view, was to reduce our—our—our—our—our investment in—in the underperforming assets, whatever they were. Okay? I mean, we sold salary operations. We sold contractor operations.

Q. I understand part of the goal was to reduce—to divest the company of, as you [s]ay, underperforming assets. But another part of the goal was to acquire—have the company buy back from the dealers valuable franchises. Isn't that right?

A. In locations where it made sense that they could be operated more profitably as a salary operation or as a contractor operation, then yes.

* * * * *

[96] Q. * * * I just want to—because we're going to be in front of a jury—is that the goal here is that the quality sites that were previously being—or were then being operated by a lessee franchisee, the goal was to convert those quality sites into a company-operated, Motiva-operated station?

A. From a planning perspective, yes.

Q. From a planning perspective. And how you—whether you could get there or how you got there was another issue. Is that right?

A. Whether you could come to terms that are mutually agreeable is another issue.

* * * * *

[225] Q. Was it your expectation when the new rent program was enacted that the number of lessee dealers would increase—would decrease and the number of company-operated stores would increase, that that would be one of the impacts that resulted from the adoption of the new rent program?

* * * * *

A. The answer is yes, with a clarification.

[226] Q. Now, what is your clarification?

A. My clarification is, you know, the way that you're expressing it on a high level is that the number of—of company operations would increase. Well, of course, they would increase because that has been established as that's your primary channel from a planning point of view, and from a planning perspective, that is where you're going to focus your investment and your growth. Will the change in the rent program, will it have some impact on the RORO locations? Quite possibly, it will. The increase in taxes on a lot of these sites will probably have an impact as well. I mean, yes, but one isn't linked to the other.

* * * * *

[243] Q. Could you explain the reasons why Motiva and Equilon adopted the new rent program?

A. There were really several reasons. One is I know that Shell had been dissatisfied with the performance of the—of the VRP program, the variable rent program. The throughputs at the—at the outlets had continued to drop. Program was not yielding the results and the throughput performance that was desired.

[244] And also as a result of the benchmark study in 1997, it was very clear that Shell's net rental recovery per outlet was the lowest in the industry. That—those items, coupled with the fact that the industry as a whole over time had moved to market-based rental programs, and coming into the Alliance with Texaco and Star Enterprise already in a—in their own market-based rental programs, a decision was made to—to drop—to drop VRP and to—to develop a new rent program.

* * * * *

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

C. A. No. 01-11300-RWZ

FRANCIS MARCOUX, et al.,
Plaintiffs,

vs.

SHELL OIL PRODUCTS CO. LLC, et al.,
Defendants.

TRANSCRIPT OF JURY TRIAL
DAY 6
November 22, 2004

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* * * * *

[45] RICHARD MELANSON, having been duly sworn by the Clerk, testified as follows:

* * * * *

Q. It's true, is it not, that you formerly operated a [46] Shell-branded gasoline station?

A. That's correct.

Q. Where?

A. It was located at 904 Main Street, Southbridge, Massachusetts.

Q. What were the dates of operation of that station, please.

A. I first took it over in 1976 and I sold it in 2001.

* * * * *

[51] Q. At some point in time after the formation of Motiva, were you presented with a lease to sign, a Motiva lease?

A. Yes, I was.

Q. For the use of your station?

A. Yes, I was.

Q. For the use of your station?

A. That's right.

Q. Did that Motiva lease have a rent subsidy or rent rebate program as part of it?

A. No, it did not.

[52] Q. How did the level of rent that you were required to pay under the new Motiva lease compare to the rents that you were paying when Shell had its rent subsidies programs in effect?

A. It was substantially higher.

* * * * *

[62] Q. Now, I note, sir, in 2001, there is only data for nine months. Can you tell the jury what occurred in 2001?

A. I sold my gas station in October.

Q. And why is it that you had decided to sell your station?

A. I gave it my best shot, and it wasn't working out. And the books looked pretty good at the time, and I couldn't see any future the way the rents were so high, my prices were already—I already raised all my prices and everything and my cigarettes, my soda, everything, my labor, to make a profit, and I thought I was in a position at that time—I was tired of fighting with Shell all the time.

They had done away with all the programs they had, the communications were bad. They would bill me for stuff that I shouldn't have got billed for, and it took me forever to get it credited to my statement. It became a nuisance to deal with them.

Q. In relation to the filing of the lawsuit, Mr. Melanson, did your decision come before or afterwards?

A. Oh, it was after.

[63] Q. I'm sorry.

A. It was in 2001 that I decided.

Q. Did you alert Motiva at that time that you were going to sell your franchise?

A. Yes, I did. I asked them if they'd like to sell me the property, and they said, no. I asked them if they'd buy my business, and they said no.

* * * * *

[65] Q. How much, sir, were you able to get for the business when you sold it?

A. $125,000.

* * * * *

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

C. A. No. 01-11300-RWZ

FRANCIS MARCOUX, et al.,
Plaintiffs,

vs.

SHELL OIL PRODUCTS CO. LLC, et al.,
Defendants.

TRANSCRIPT OF JURY TRIAL
DAY 7
November 23, 2004

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* * * * *

[27] RICHARD MELANSON, RESUMED
CROSS-EXAMINATION, CONTINUED

* * * * *

[38] Q. Now, you testified there came a time when you sold your station to Mr. Abraham; is that correct?

A. Yes, I did sell it to him.

Q. And as part of that sale, you had to provide Shell or Motiva a right of first refusal to purchase your station instead of selling it to Mr. Abraham; is that correct?

A. Yes.

Q. And you wrote a letter to Motiva formally complying with that obligation saying this is to notify you I'm selling

it and you have a right to exercise your right of first refusal, do you recall that?

A. Yes.

Q. I believe you said on direct that you understood from discussions with Motiva, your sales rep, that they were not interested in purchasing your business or they were unlikely to exercise that right; is that correct?

A. Yes.

* * * * *

[42] Q. And as a result of that, the sale went through and you received the $125,000 from Mr. Abraham?

A. Shell received $6500 for the transfer fee.

Q. Did you ever attempt to undo the sale or undo the transaction to Mr. Abraham, ever try to return the money?

A. No.

Q. The sale was in around October of 2001; is that correct, the closing?

A. It was on the evening of September 30th, I believe.

Q. Now, you decided about a year before, sometime in 2000, that you wanted to sell your station?

A. No, I didn't. It was in more of 2001 that I really made a decision that I was going to sell it.

Q. Did you make some changes in your business in 2000?

A. Yes, I did.

* * * * *

[44] Q. And some of the changes you made were to increase prices of various products, and I believe you said that that decreased your volume but on an overall basis it increased your total revenue; is that correct?

A. Yes.

Q. So, in other words, your volume went down, but because the prices went up, in a sense by more than that, your total revenue increased?

A. The basic picture looked pretty good profit-wise.

* * * * *

[49] Q. The final thing I want to go over with you is the net income from R.A.M. Corporation for the years 1994 through 2001. Again, let me represent these were taken from your financial documents. For the years 1994 through 1997, the net income went down, particularly '97, significantly, didn't it?

A. Net income, yes.

* * * * *

[50] Q. So, for the year 2000 though, your net income, and that was the first year no rebates, no subsidies, the year 2000, it was up to 56, almost 57,000; is that correct?

A. Yes, that's the year I worked really hard to make some changes so I could pay the rent.

Q. They paid off even better in 2001, your net income was up to 18[8],000?

A. That is the net income, that is the $125,000 that I sold the business in.

* * * * *

[54] REDIRECT EXAMINATION

* * * * *

Q. Mr. Melanson, counsel was just asking you questions about your net income for the year 2001, and in particular, as to whether or not that number reflected the sale of

your business in that year. Do you recall those questions?

A. Yes, I do.

Q. And you testified that you couldn't—that you did not believe that that number—or you believe that that number did include the value of the business?

A. Yes, I did.

* * * * *

[55] Q. I ask you to look, under categories listed, sale of business, is there a number reflecting $165,000 or 167,000?

A. Yes, there it is.

Q. Having reviewed that document, does it help refresh your memory of whether or not it was included in your gross income?

A. Yes, it was included.

* * * * *

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

C. A. No. 01-11300-RWZ

FRANCIS MARCOUX, et al.,
Plaintiffs,

vs.

SHELL OIL PRODUCTS CO. LLC, et al.,
Defendants.

TRANSCRIPT OF JURY TRIAL
DAY 7
November 23, 2004

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* * * * *

[60] SID PRASHAD, having been duly sworn by the Clerk, testified as follows:

* * * * *

Q. You are a current operator of a Shell-branded gasoline station located on 48 Madison Street in Worcester; is that correct?

[61] A. Yes, that's correct.

* * * * *

[67] Q. After the formation of Motiva, were you at any point in time presented a Motiva lease for the station that you operated?

A. Yes.

Q. Did you have an opportunity at that time to look at the amount of rent that Motiva was proposing to charge you under [68] their lease?

A. Yes.

Q. How did that rent, sir, compare to the rents that you were paying when the rent subsidy programs were in effect?

A. It would be at least more than two times.

* * * * *

[70] Q. Did you eventually sign the lease?

A. No, I didn't want to sign it at first.

Q. Did you have any discussions voicing your concern about signing the lease with any Motiva representatives?

A. Yes, in a short period I had about three reps, and the first two were very brief, and I discussed that, you know, I can't pay this rent at this location. They insisted, that's the rent, that's what it's going to be, that I have to sign it, that I refused to sign it for a couple months.

Q. But you eventually did sign?

A. Yeah, Mr.— I think it was Mr. Richard Kennedy signed it. He came to the office, and he seemed upset, so I went into the office, we sit down. He said, "You have to sign this lease. If you don't sign the lease in 10 days, you will be terminated."

Q. And you signed it?

A. Well, no. I told him, Yes, okay, well, I would sign it but I want to sign it under protest. He directly said, and this was his words, he said, I remember it up to this date, he said on that paper you put your signature and the date, but anything else you will be terminated.

Q. Did you comply with his direction?

A. I had no choice.

* * * * *

[77] Mr. Prashad, you talked about gallon sales, competitive prices and higher rents. What steps have you taken to try to make your business more profitable in light of these expenses?

A. I've taken several steps. I wanted to stay in business. I liked where I was, so I took several steps to try to be and stay in business. No. 1 was I've started working more hours. I'm at my station every day in Worcester and spend in three days 10 hours. I have my mother who understands what's going on. She brings the phone, and I call her, she might be there. She works between 40 and 60 hours a week. [78] She's 65 years old because I can't afford to hire more employees. I've also got a line of credit at my bank so when I can't pay the bills to Shell, I don't bounce the check. If I bounce the check, I'll have to have a check waiting for the gas when the company brings the gas.

Q. You mentioned you work 8 to 10 hours a day. Approximately how many hours a week are you working now?

A. I work Saturdays and Sundays, 60 to 70 hours a week.

Q. How much of a salary do you draw, sir, annually?

A. I believe I discussed my accountant, and I've I think it's about between 27,000 dollars a year.

Q. And you mentioned that your mother works. Was it 40 to 60 hours a week as well?

A. Yes.

Q. How much of a salary do you pay her, sir?

A. Well, she understands what is going on with me in the business, and she understands, you know, where my

business is because of the rent and so forth, and she offered to help me and she spends as much as time as she can to help me. When I can't be there, she is there.

Q. The question, Mr. Prashad, how much does she get paid for that time?

A. She knows my position, so she wants to help me as a son, she don't get any pay.

* * * * *

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

C. A. No. 01-11300-RWZ

FRANCIS MARCOUX, et al.,
Plaintiffs,

vs.

SHELL OIL PRODUCTS CO. LLC, et al.,
Defendants.

TRANSCRIPT OF JURY TRIAL
DAY 7
November 23, 2004

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* * * * *

[108] JORDAN AVRAMIDIS, having been duly sworn by the Clerk, was examined and testified as follows:

* * * * *

[109] Q. And you, sir, formerly operated a Shell branded gasoline station or gasoline station[s]; is that correct?

[110] A. Yes, I did.

Q. And those stations were operated through a corporation; is that correct?

A. Yes.

Q. And what was the name of the corporation, please?

A. The previous ones?

Q. Yes.

A. It was J&J Avramidis, Inc. and the other one was J&D Avramidis, Inc.

* * * * *

Q. What were the effective dates that you operated that station, please?

A. I started April 1, 1992 until April 30, 2004.

* * * * *

[117] Q. After the formation of Motiva Enterprises and at the expiration of your Shell lease that you signed in 1997 were you [118] presented with a new Motiva lease?

A. Yes, I did.

Q. And did that lease offer any sort of—as Mr. Wolf was saying—any sort of rent subsidy or programs that might offset your rent?

A. No.

Q. How did the amount of rent that you were being charged under your new Motiva lease compare to the rents that you were paying when you had the rent subsidies available to you from Shell?

A. I would say at least double if not more.

* * * * *

Q. Mr. Avramidis, when this chart comes into focus, if you could look at it, please, and let me know if it represents the rents that were paid for the period 1994 to 2003 at the Walpole location.

A. Yes.

Q. And in 1994 that rent was approximately $18,500?

A. Yeah.

Q. And in 2003 the rent had escalated to approximately $63,000.

A. Yes.

Q. Were you made aware, Mr. Avramidis, at the time you were [119] presented with your Motiva lease that you had an ability or right to challenge through a reappraisal the amount of rent you were paying?

A. Yes, I was, yeah.

Q. And did you exercise your right to get that reappraisal?

A. No, I didn't.

Q. Can you tell us why you made that decision?

A. Well, that is that I only had the choice to take the appraisal that Shell—I had to choose from three that Shell had in the lease, and would it be closer to my target, and I didn't think—I could trust making—I don't think it would be any different than the regional because it would come from the same service.

Q. Did you eventually sign the Motiva lease?

A. Yes, I did, yeah.

Q. And did you in any way indicate that you were protesting the lease as you signed it?

A. Yes, I did.

Q. How did you go about doing that, sir?

A. I'm in the lawsuit here, so I'm protesting with the lawsuit.

Q. You regarded the filing of the lawsuit as a protest?

A. Yeah.

Q. And had you filed the lawsuit prior to signing the lease?

A. Yes.

* * * * *

[126] Q. In light of the increased rents and the gas prices did you make any efforts to try to improve the operation of your business?

A. I tried, yeah, I did.

Q. Can you tell us, please, what steps you took to improve the business?

A. Well, the first thing that I did, I raised my price, and obviously that didn't help much because my volume dropped even more; and I increased my personal hours in the station, I was putting like 80 to 90 hours a week, and—

Q. Did you ever voice any concerns to any Motiva or Shell representative about your financial situation?

A. Yes, I did.

Q. Can you tell us who you spoke to and when?

A. I remember speaking to Craig Wolf, the sales rep, and we told him things don't look too good, you know, we cannot afford to—doesn't look like we can afford to pay the rent anymore and everything. And his reaction was—he had his feet up on the counter, he said if you don't think you can stay, why don't [127] you give us the keys?

Q. That was his solution to your predicament?

A. Yeah.

Q. Did you have any other conversations with any other Shell or Motiva people?

A. Just the last month before I was forced to close the station. I had a visit from the district manager[,] from Steve Bradley and I told him—I brought my concern that the way it looks like we're going to be out of there very shortly, I couldn't stay anymore. And his first reaction

was when do you think that's going to be? How long is that going to be before you go out?

Q. Did he have any suggestions to you in terms of ways that you might help to improve the operation of the business?

A. Not at all, no.

Q. And what, in fact—your business is no longer operating; is that correct?

A. Yes.

Q. Did you sell the business to a third person or did you sell it back to Shell?

A. No, I just gave them the keys.

Q. You turned the business back into them?

A. Yeah.

Q. Mr. Avramidis, the operation of the business in Walpole, it's true, is it not, that in the years when the variable rent [128] program was in effect that the business still operated with a bit of a loss; is that correct?

A. Yes, it did.

Q. Okay. How did that loss compare to the loss that the business sustained in later years after the VRP was eliminated?

A. As the years go by, it increased it more.

* * * * *

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

C. A. No. 01-11300-RWZ

FRANCIS MARCOUX, et al.,
Plaintiffs,

vs.

SHELL OIL PRODUCTS CO. LLC, et al.,
Defendants.

TRANSCRIPT OF JURY TRIAL
DAY 8
November 24, 2004

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* * * * *

[116] JEFFREY BERNARD, having been duly sworn by LAW CLERK, was examined and testified as follows:

* * * * *

[117] Q. If you could just describe for us your employment background after you graduated from Penn State in 1969.

A. I went to work for Mobil Oil Corporation in 1969.

Q. How long were you at Mobil?

A. I was there for 30 years.

* * * * *

[119] Q. Is it fair to say that you were responsible at least in part in developing Mobil's rents for its lessee dealers?

A. Yes. During the period when I was planning manager I was responsible for—in an advisory capacity and a direct capacity to develop the rent programs, and in the capacity after 1997 to implement those rent programs.

[120] Q. And you left Mobil in 2000?

A. I left Mobil in April of 2000.

Q. Now, during the period 1985 through 2000 you were obviously familiar with the way that Mobil set rents.

A. That's correct.

Q. And if you could just tell the jury how Mobil set rents and [how] it changed during the period late '80s and throughout the decade of the 1990s.

A. As I described before, through 1992 we used the two-part rent system, a gallon collection on gasoline and fuels for part of the rent on a cents-per gallon basis, and then flat rent for other ancillary alternate profit centers.

In 1992 we started transitioning to an asset-based rent, where we calculated rent based on the value of the assets at the service station; and we used a formula that was eight percent. The way we determined eight percent was we looked at what was happening in the marketplace, what other competitors were doing, and also what would keep our dealers competitive in that marketplace.

* * * * *

[124] Q. Can you please share with us what your opinion is?

A. In my opinion the eight percent of asset value was the industry standard. This business is extremely competitive, and you cannot allow—as a company we had a responsibility to our dealers to make sure that they stayed competitive. Eight percent—the eight percent rent was a competitive program compared to what others in the

industry were paying, compared to what our—Mobil's desire to make from each of the locations because we made money not only from rent but we also made money from the sale of gasoline. We took that into consideration. We felt eight percent was the correct number.

* * * * *

[132] CROSS EXAMINATION

* * * * *

[133] Q. Okay. I'll get to the percentage in a minute, but I wanted to ask you some questions about the use of an asset-based rent formula.

As I understand your testimony, it's that an asset-based rent formula is the industry formula; is that correct?

A. Many companies have gone to that formula, yes.

Q. In fact, by the late 1990s hadn't most of the major branded gas companies transitioned to an asset-based rent formula?

[134] A. I believe that's correct.

Q. Okay. And they did so because they wanted to get a reasonable rate of return on their investment in real estate, just like a landlord would?

A. I think that they were reflecting the economics of each of the individual service stations, yes.

Q. So is the answer to my question, yes?

A. They were—they were understanding their role as a landlord as well as a supplier, yes.

* * * * *

[136] Q. Okay. In fact, Motiva didn't transition to an asset-based rent until about 2000 or so; isn't that right?

A. Well, I think they started to—the thought process in 1998 and 1999, and when they were able to implement it started in 2000.

Q. Okay. So it was actually one of the later companies to transition to the asset-based rent?

A. Yes, it was.

Q. In fact, Mobil had done so, I think you testified, in 1992 or 1993?

A. That's correct.

Q. So Motiva was late to the dance.

A. Late bloomers.

* * * * *

[142] Q. * * * Now, the only company that you mentioned that actually uses that formula is Mobil; is that right? Did I hear your testimony correctly?

A. Other companies, according to what I've been told by other companies, and the way that Mobil determined the rent also used—I believe, used eight percent in their net rent calculation.

Q. Okay. And what other companies used eight percent apart from Mobil?

A. Over a period since 1992 we looked at various number of companies. I was told specifically that in the time frame 1998, 1999, 2000 that Sunoco and Cumberland Gulf used eight percent.

Q. And who told that you Cumberland Gulf used eight percent in the 1998 to 2000 time?

A. A representative from Cumberland Gulf.

Q. Okay. And what's this person's name?

A. I met her at a meeting in Arizona. I cannot tell you what her name is. I know she was—the meeting I was at was high-level executives from all the represented companies, so I know she was in a position to be able—to give me information.

[143] Q. Well, do you know what her job position is?

A. I think she was the marketing operations manager.

Q. Do you know whether she was responsible for rent?

A. She understood what the rent program was for Cumberland Gulf.

Q. Okay. So it's your testimony that another company that used an eight percent asset-based rent formula in the 1998 to 2000 period is Cumberland Farms Gulf?

A. What they told me—I described what Mobil's program was and she told me their program was consistent with Mobil's program.

Q. But she didn't tell you that they used an eight percent asset-based formula

A. I assume from the conversation what she meant was and what she said was Mobil is the big daddy in New England where Cumberland Gulf is—primarily markets, and we couldn't be out of line with what Mobil was doing.

Q. Okay. But she didn't at the time [tell] you eight percent, you assumed that?

A. I assumed that from the conversation because she said it was consistent with Mobil's program. Same thing with Sun.

Q. Tell me about Sunoco. Who told you their program was eight percent asset-based rent in 1998 to 2000 period?

A. Their eastern regional dealer.

Q. And tell me what he told you.

[144] A. He described—he used to be a Mobil employee so I knew him very well. I described what Mobil's current program was, he side said Sunoco's program is consistent with Mobil.

Companies aren't very—they're reluctant to talk about specific programs. They would confirm that their program was consistent with Mobil.

Q. Did this unnamed person from Sun company also tell you that Sun used an eight percent asset-based rent formula?

A. He said the Sunoco program was consistent with the Mobil program. I confirmed with this other Sunoco dealers who happened to be my client. Based on your locations, they paid eight percent in rent.

Q. But the company representative that you talked to never told you they used an eight percent rent formula in so many words?

A. No, he would not—he said, look, that's proprietary information. I will tell you that our program is consistent with Mobil's.

* * * * *

[146] Q. Okay. So your opinion about the eight percent asset-based rent formula only relates to the period 1998 to 2000?

A. Well, in addition to that I've confirmed with sources at Mobil, who are in the real estate department and also are—used to work for me in the customer support area where we had to—we were responsible for implementing rent, if the rent program had changed; and I was told that they had not implemented a new rent program, that it was still at eight percent.

Q. And who did you talk to at Mobil that told you that?

A. Dave Fisher in the real estate department and Debra Scoal, who worked for me in Malvern in the customer support area. She's responsible for and in charge of all the relationships with dealers and distributors.

Q. And did those two people tell you specifically that Mobil still used an eight percent asset-based rent formula?

A. That's what they told me.

Q. So your testimony today to the jury is up through the present Mobil continues to use an eight percent asset-based rent formula?

A. Up until the end of 2003 the people that should know were not aware of any change to Mobil's eight percent program.

* * * * *

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Civil Action No. 01-11300-RWZ

FRANCIS MARCOUX, et al.,
Plaintiffs,

vs.

SHELL OIL PRODUCTS CO. LLC, et al.,
Defendants.

TRANSCRIPT OF JURY TRIAL
DAY NINE
November 29, 2004

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* * * * *

[28] STEPHEN PISARCZYK, SWORN

* * * * *

[29] Q. Mr. Pisarczyk, it's true, is it not, that you've operated Shell-branded gasoline stations since the 1970's?

A. That's correct.

Q. And most recently you operated two different stations, one located at 114 West Boylston Street, West Boylston, Massachusetts and the other at 257 West Boylston Street, West Boylston, Massachusetts?

A. That's right.

* * * * *

[30] Q. Do you recall having any specific conversations with any Shell representatives concerning the variable rent program?

A. Yes, I recall.

Q. Can you please tell us with whom you spoke, approximately what that date was, and what the substance of the conversation was?

A. During around 1989, I believe it was, I was interested in purchasing another franchise; and I had gone to the bank and applied for a loan around $200,000. And the loan officer at the bank asked me if I would bring my lease package in for them [31] to review. When they reviewed the package, they saw that I had a clause in my variable rent program where I—Shell could terminate the variable rent in 30 days. They asked me to clarify this. And I went back and spoke to Mr. Winters, who was my Shell representative, and he—when I brought the subject up to him, he asked me how long have I been in business? And I said since 1982. And he said you've had the variable rent program ever since then, haven't you? And I said yes, I have. And he told me at that time that the variable rent program would continue into the future, or a similar program, and that I shouldn't worry about it and go back to the bank and explain the situation to them. And I did.

Q. Did you get your loan?

A. Yes, I did.

Q. Did you have any other conversations with any Shell representatives in particular with regard to the location that you operated at 114 West Boylston Street?

A. Yes, I did. I also spoke to Mike Winters about my 114 location, that I intended to modernize my C-store there and renovate the station into a garden center. And I was

concerned at that point as to whether the VRP would continue or whether I would have to pay my contract rent. And he told me to just go ahead and make my investments, that I wouldn't have to worry about paying the contract rent.

Q. Do you have an approximate date for this conversation, sir?

[32] A. It was probably in the early 90's, I believe.

Q. Based upon the discussions that you had with Mr. Winters and your experience with the program since 1982, what was your understanding with regard to the variable rent program?

A. The variable rent program was the method that Shell used to compute my rent.

Q. And what, if anything, Mr. Pisarczyk, did you do in reliance upon the statements that had been made to you about the variable rent program?

A. I made some investments into my station that I ordinarily wouldn't have done if I had to pay the contract rent.

Q. And in 1998, the variable rent program was replaced with a STIP program; is that correct?

A. That is correct.

Q. And were you able to continue to earn rent credits with the STIP program, in effect?

A. Yes, I was, but they weren't as great.

* * * * *

Q. When this variable rent program comes into focus, I'd like you to look at the numbers and tell us if they accurately reflect the amount of rent that you were paying at your 114 station?

A. Yes, they do.

Q. And in 1994, your rent was approximately $24,000; is that correct?

[33] A. That's correct.

Q. Now, I see in the year 2000 that we've got calculated seven months rent. Why is that?

A. I stopped selling gas in the end of July.

Q. So you weren't charged rent anymore?

A. That's correct.

Q. Had you paid the full year's rent in 2000, do you know what that amount would have been?

A. It would have been about $57,000.

Q. At some point towards the end of 1999, did you have an occasion to sell your other location at 257 West Boylston Street?

A. Yes, I did.

Q. And could you just tell us briefly what the circumstances were surrounding the sale of that property or that business?

A. During May of '99, I had a firm offer to purchase the 257 location for $300,000, and I forwarded a right of first refusal to Shell.

* * * * *

[36] Q. Focusing—and I know this is probably true for all of your Shell stations, but focusing on 114 West Boylston Street, it's true, is it not, that you're required to purchase your gasoline from Shell Oil Company?

[37] A. That's true.

Q. And you pay a price which is referred as to a DTW?

A. Yes.

Q. Have you ever had any discussions with any of your Shell representatives concerning the dealer tank wagon price that you pay?

A. Yes, I spoke to Mike Winters.

Q. And can you tell us, please, what the substance of the conversation you had with Mr. Winters was—

THE COURT: When did it take place?

THE WITNESS: This took place in probably the mid 90's—'96, '97 and after.

Q. And what was the substance of the conversation?

A. Excuse me. I'm sorry, that isn't right. It took place probably in, I believe, in the late 80's it started.

Q. Okay. And what was the conversation?

A. I spoke to him and I told him that the—the price I was paying for my gas was making it so that I was uncompetitive on the street. I was paying just too much money for the gas. And my competitors were all pricing way below me. And I just couldn't get down to their prices because what they were posting is what I was selling my gas for.

Q. And did he have a response to your concern?

A. He said that there really wasn't anything he could do as a Shell rep.

[38] Q. You're required, are you not, to offer sales of gasoline through credit cards at your station?

A. Yes.

Q. And it's true, is it not, sir, that you're required to pay a fee for the credit card services?

A. Yes.

Q. And what percentage is that, please?

A. It's around 3 percent.

Q. And who does that money get paid to?

A. Shell.

Q. You mention that your competitive prices on the street were higher than the other stations in the immediate area of the 114 West Boylston location?

A. That's correct.

* * * * *

[40] CROSS-EXAMINATION

* * * * *

[54] Q. So in the year 2000 when you showed a loss of $22,000, you actually had already decided to purchase the 114 West Boylston Street station, correct?

A. That's correct.

Q. And, in fact, you had been operating that station, in part, as a garden center for several years, had you not?

A. It was part of the operation, yes.

* * * * *

[57] Q. When did you decide that you wanted to purchase 114 West Boylston Street?

A. I wanted to purchase it from day one when I first received the lease there.

Q. And did you operate just a garden center there from day one?

[58] A. No, I didn't.

Q. When did you want to operate just a garden center there?

A. I would say probably I decided around the time I wanted to sell the 257 location.

Q. Okay. And was your son in business with you?

A. Yes, he was.

Q. Was he actually operating the garden center?

A. No, he wasn't.

Q. Okay. Who purchased the—who actually purchased the 114 West Boylston Street property?

A. My son did.

Q. Pardon me?

A. My son.

Q. So the purchase was actually made by your son, not by you?

A. That's correct.

Q. And what was the purpose for which the business was used thereafter, for which the property was used thereafter?

A. Our intention was to continue our garden center there, but due to the time it took for Shell to clean up the hazardous waste on the property, which was over a year, we were forced to buy another piece of property and set our garden center up there.

Q. What did you do with the property when you purchased it?

A. My son purchased it.

Q. I'm sorry, when your son purchased it. I stand corrected.

[59] A. I believe he eventually leased it and then I think he sold it.

* * * * *

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

IN RE Shell Oil Products Co. Dealer Franchise Litigation	MDL Docket No. 1461 United States District Court for the District of Massachusetts Civil Action No. 01-CV-11300 RWZ United States District Court for the District of New Hampshire Civil Action No. 01-CV-430 United States District Court for the District of Rhode Island Civil Action No. 01-CV-514T

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION FOR JUDGMENT AS A MATTER OF LAW

Defendants, Shell Oil Company ("Shell"), Shell Oil Products Company, LLC (f/k/a Shell Oil Products Company), and Motiva Enterprises LLC ("Motiva") (collectively "Defendants") respectfully submit this memorandum in support of their Motion for Judgment as a Matter of Law as to all counts in the Plaintiffs' Second Amended Complaint dated January 15, 2003 (the "Complaint").

* * * * *

D. Counts I and II – PMPA

Defendants are entitled to judgment as a matter of law on the PMPA claim on several grounds. The threshold reason is that there has been no evidence presented to support the Plaintiffs' claim that they have been constructively terminated. Indeed, with one exception, the parties have taken affirmative steps to continue the fran-

chise relationship, with all but Mr. Pisarczyk entering into at least one renewal agreement after the Defendants ended all rent subsidy programs.

Furthermore, as discussed in Defendants['] Motion for Summary Judgment on Counts I and II under the PMPA, none of these renewing plaintiffs took steps to challenge the terms of their renewal agreements as provided for in the PMPA and which have been found to be the exclusive remedy for addressing claims arising out of renewal contracts. *See Dersch Energies, Inc. v. Shell Oil Co.*, 314 F.3d 846 (7th Cir. 2002).

The PMPA was enacted to address one narrow aspect of petroleum franchises—their ending, either by termination of franchises or non-renewal of franchise relationships. *Dersch Energies, Inc. v. Shell Oil Co.*, 314 F.3d 846, 859 (7th Cir. 2002); *Chestnut Hill Gulf, Inc. v. Cumberland Farms, Inc.*, 940 F.2d 744 (1st Cir. 1991); *Meghani v. Shell Oil Co.*, 115 F. Supp. 2d 747, 757 (S.D. Tex. 2000); *Ackley v. Gulf Oil Corp.*, 726 F. Supp. 353, 359 (D. Conn. 1989), *aff'd per curiam*, 889 F.2d 1280 (2d Cir. 1989). In finding against the existence of a claim for constructive termination or nonrenewal under the PMPA, the Seventh Circuit in *Dersch* emphasized that the regulation of petroleum franchise relationships is not governed by the PMPA but rather is a matter "of local concern in which the parties frame their relationships with reference to state law." 314 F.3d at 861. "Congress enacted the PMPA to federalize the standards by which petroleum franchises are terminated and petroleum franchise relationships are nonrenewed, not to create a federal common law for governing petroleum franchise agreements. In other words, the PMPA was not designed to provide franchisees with a federal forum for run of the mill contract disputes like those at issue in this case.

Without termination or nonrenewal, Dersch has no claim under the PMPA." *Id.*

Like the plaintiff[ ] in *Dersch*, the crux of the Plaintiffs' claims in the instant matter is that the Plaintiffs did not like certain changes implemented by Defendants, not that their franchises have been terminated in a manner governed by the PMPA. However, to the extent that they can demonstrate that there has been a termination or nonrenewal recognized under the PMPA, the statute, as interpreted by a substantial body of case law, provides a specific and exclusive remedy and Plaintiffs simply failed to adhere to that stated procedure. Specifically, the PMPA limits the grounds upon which a franchisor can terminate or decline to renew a franchise and requires the franchisor to give 90 days' written notice to the franchisee before doing so.

A franchisor that believes that it has grounds to terminate or non-renew a franchise must initiate the process by sending a notice of termination or non-renewal that strictly complies with the requirements of Section 2804(c). *See Abrams Shell v. Shell Oil Co.*, 216 F. Supp. 2d 634 (S.D. Tex. 2002), *aff'd*, 343 F.3d 482 (5th Cir. 2003). This commences a 90-day waiting period during which termination or non-renewal is prohibited. 15 U.S.C. § 2804(a)(2). During this waiting period, the franchisee remains in control of the station and suffers no PMPA damages flowing from termination or non-renewal. The purpose of the 90-day waiting period is to allow the franchisee an opportunity to seek to enjoin the termination or non-renewal under the less stringent standard for injunctive relief set forth in subsection 2805(b)(2). *See Jet, Inc. v. Shell Oil Co.*, 2002 U.S. Dist. LEXIS 22951, *15 (N.D. Ill. Nov. 22, 2002), *citing Beachler v. Amoco Oil Co.*, 112 F.3d 902, 905 (7th Cir. 1997).

This statutory scheme protects both the franchisor and the franchisee. *See Beachler*, 112 F.3d at 905. No termination or non-renewal can be effective unless the franchisor strictly complies with the notice requirements of Section 2804(c). *See Abrams*, 216 F. Supp. 634. The sending of the statutory notice of termination provides both the franchisor and franchisee with an unambiguous statement of the grounds for termination or non-renewal, and clearly commences the 90-day waiting period. 15 U.S.C. § 2804(c); *see Jet, Inc.*, 2002 U.S. Dist. LEXIS 22951 at *15. The injunctive relief procedure allows the franchisee to continue operating its business on the terms of the previous agreement while the merits of its action against the franchisor are resolved. *Id.*; *Dersch*, 314 F.3d at 863.

In light of the alternatives available to franchisees under the remedial scheme of the PMPA, federal courts across the country have uniformly rejected claims under the PMPA where the franchisees have elected to renew their franchise agreements without following the notify-and-wait procedure contemplated by the statute. *See, e.g., Jet, Inc.*, 2002 U.S. Dist. LEXIS 22951 at *18 (rejecting claim under PMPA where plaintiffs renewed their franchise agreements rather than refusing them, receiving a statutory notice of non-renewal and seeking injunctive relief within 90 days as prescribed by the statute); *Abrams Shell*, 216 F. Supp. 2d at 641 (finding no claim under PMPA where the franchisor had not given a definite notice of termination or non-renewal pursuant to § 2804 and the franchise relationship was ongoing); *Dersch*, 314 F.3d at 866 ("Had [plaintiff] allowed the defendants to issue a formal notice of non-renewal, its dispute with the defendants would have been transformed from a mere contract dispute into a non-renewal (within

90 days) of its franchise relationship—thus allowing it to meet its burden under § 2805(c) and maintain suit against the defendants via § 2805(a)-(b). However, by signing the renewal agreement, and thus renewing its statutory 'franchise,' [plaintiff] divested itself of the right to bring an action under the PMPA."). These cases demonstrate that a franchisee cannot sustain a claim under the PMPA when it signs a new agreement and accepts the benefits of renewal, leaving all of the statutory components of its PMPA franchise intact.[4]

In sum, the PMPA does not permit a franchisee to sign a renewal agreement, ignore the statutory procedures for challenging the agreement, and *then* bring suit for damages.

Four of the Plaintiffs (Karol, Marcoux, Moawed and Prashad) remain in operation and each entered into new franchise agreements with Motiva[5] without challenging their terms under the procedures of the PMPA. One Plaintiff (Melanson) likewise entered into a new lease and supply agreement with Motiva[6] without challenging their

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[4] Plaintiffs have cited to *Pro Sales, Inc. v. Texaco, U.S.A.*, 792 F.2d 1394 (9th Cir. 1986) for the proposition that a franchisee need not go out of business before seeking relief under the PMPA. However, not only has the *Pro Sales* case been discredited and criticized by numerous courts[,] [it] is entirely distinguishable from the instant case. In *Pro Sales*, the court held that a franchisee who signs a renewal lease "under protest" and *promptly* seeks to invoke its rights under the PMPA has not renewed the franchise relationship so as to bar relief under the PMPA. *Id.* at 1399. As this Court has noted in its October 22, 2003 decision on Plaintiffs' Request for Injunctive Relief, the Plaintiffs here did not renew their franchises under protest and certainly did not seek "prompt" relief under the PMPA.

[5] Karol: January, 2001 and January, 2004; Marcoux: November, 2001; Moawed: January, 2004; Prashad: July, 2000 and July, 2003.

[6] Melanson: June, 2001

terms under the procedures of the PMPA and thereafter sold his business to a third party for $125,000.

Still another dealer (Sullivan) entered into a new lease and supply agreement with Motiva[7] without challenging their terms under the procedures of the PMPA and thereafter entered into an express mutual termination of the franchise relationship, which is a proper ground for termination under the PMPA. 15 U.S.C. § 2802(b)(2)(D). This issue is separate and distinct from the issue of release, since it rests on a permissible ground for termination under the PMPA and is not subject to a claim of duress since dealers have procedural safeguards to challenge an impermissible termination under the PMPA, none of which were exercised.

Plaintiff Avramidis also entered into new franchise agreements with Motiva[8] without challenging any of their terms in accordance with the exclusive procedures available under the PMPA.

Plaintiff Pisarczyk continued to operate his business well after the rent subsidy programs ended without challenging the contract rents or any other terms of his existing lease, and he continued to pay full contract rent until he voluntarily ceased operating a service station on the location and purchased the property from Motiva in order to run the garden business he had developed at the location.

* * * * *

[Dated: November 29, 2004]

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[7] Sullivan: June, 2000

[8] Avramidis: January, 2002

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Civil Action No. 01-11300-RWZ

FRANCIS MARCOUX, et al.,
Plaintiffs,

vs.

SHELL OIL PRODUCTS CO. LLC, et al.,
Defendants.

TRANSCRIPT OF JURY TRIAL
DAY ELEVEN
December 1, 2004

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* * * * *

[72] ROBERT MORRIS, SWORN

* * * * *

[73] Q. And you retired you say basically?

A. Yes.

Q. How long has that been?

A. I retired in April or June of 2002.

Q. And from what position did you retire?

A. At the time of my retirement I was the General Manager of Network Development for Shell Equiva, which is one of the Alliance companies. It was Shell it was a part of.

* * * * *

[84] Q. Mr. Morris, you were describing your experience at Texaco insofar as rent rebates and rent programs were concerned.

A. Yes. As I mentioned, I went into marketing in the field position in 1994, and prior to that time the rent rebates that had been common with Texaco had been eliminated. We were on a market-based rent system.

Q. When you came to Equiva in 1998, did you understand that Shell still had rent rebates at that point?

A. Yes, I did.

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

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TRANSCRIPT OF JURY TRIAL
DAY ELEVEN
December 1, 2004

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* * * * *

[115] MICHAEL F. HANLEY, SWORN

* * * * *

[116] Q. When you testified by videotape, I believe you told us that you had been involved in the rent programs at Shell company?

A. That's correct.

Q. Can you tell us what do the leases that the lessee dealers [117] sign, what do they entitle them to do with the properties, the lease properties?

A. We lease them the land, the equipment, the improvements, the whole facility, and it entitles them to operate all of those facilities on that site.

Q. And what kinds of operations are the lessee dealers allowed to conduct?

A. Well, you know, it's kind of dependent upon what facility is there. If it's a repair station with lube bays, then they do a lot of automobile repairs; but as a C-store, then they can determine essentially what products they want to carry in the C-store and how they want to price them. And then if there's a car wash, they can determine how they want to market and manage that business.

Q. And for these businesses you've described, the convenience store, the car wash, the repair business, how much of the revenue from those businesses does Shell or Motiva participate in?

A. We don't participate in any of the revenues from the sales of any of those products other than the gasoline.

Q. You testified that you were involved in the decision to terminate the VRP?

A. I did. I was.

Q. Can you tell us why Shell decided to terminate the VRP?

A. Yes. There's a lot of reasons really. VRP came along in [118] 1982, a long time ago, and it was developed in a time when we were in a really gasoline-focused business. Gasoline is what we had. It hadn't come to C-stores yet or car washes or anything, and the variable rent program was totally focused on gasoline. So we had like a disconnect over time because the industry changed. I think you've heard some testimony about how—how people were—customers wanted C-stores, customers wanted other sources of shopping and stuff when they stopped and bought gasoline. And to have a rent program that only dealt with gasoline missed the mark of what a lot of the business was about.

Other issues included that when we started the variable rent program back in the 80's, the amount of rent

that Shell was collecting was real similar to what all the competitors were collecting. They didn't have a thing called a variable rent program. They had something and we all looked like we were collecting kind of similar rents, from the data I saw. But over time, the competitors moved on and they evolved to—into the 90's into having many of them, most of them I think, asset-based rents. And that facilitated their ability to move forward with all these new business models, like car washes and C-stores and stuff. And here we were still just with the rent program thinking gasoline. We were kind of late adapting.

Q. Why specifically was the decision made to go to an asset-based rent?

[119] THE COURT: You mean why that particular method of determining rent?

MS. FINN: Yes, exactly.

A. While I had been involved in studies that looked at a lot of different things and we hadn't quite made a decision, along came the joint venture with Texaco. And one of the things that was of great concern to us was a legal issue that said if you have two—I'm not a lawyer, but if you have two dealers who are like similarly situated or competing, if you will, or you supply them both, you have to treat them the same. You have to charge them the same prices for things and that would include rent. And so one of the things we had to decide early on when the joint venture came to be was, okay, what was that one rent going to look like? Because we had to have one.

And I was—I was the program manager for rent, among other things, and it was kind of a duh because the industry had gone to asset-based rents, Texaco was at an asset-based rent, and we had been subsidizing for a long time and not getting a return. We had to move forward,

we had to change. And it was obvious that an asset base was the right answer because that's where the industry was and that's where our partner, our new-found partner was. It was like really obvious.

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

CA No. 01-11300-RWZ

FRANCIS MARCOUX, et al.,
Plaintiffs,

vs.

SHELL OIL PRODUCTS CO. LLC, et al.,
Defendants.

TRANSCRIPT OF JURY TRIAL
DAY TWELVE
December 2, 2004

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* * * * *

[3] MICHAEL HANLEY having been previously duly sworn, was examined and testified further as follows:

* * * * *

Q. I think where we left off yesterday was, you were talking about how accurate your estimate had been about the amount of the new program rents that would result from a transition to asset-based rent.

A. Yes.

Q. Have you had an opportunity to analyze the difference between the contract rents that the plaintiffs in this case paid and the program rents that they paid on average under the new 10-12-12 asset-based formula?

A. I have.

Q. Let me ask you to look at a chart, and this is [4] Defendant's Exhibit 1526. Can you tell us what this chart is, Mr. Hanley?

A. Certainly. This chart is a rent comparison. The blue bar is the amount of the contract rent that was in the leases of the plaintiffs who ultimately signed new leases prior to the implementation of the program rent, and the red bar is the amount of rent that was in the contract in the first year of those plaintiffs' program rent contract.

Q. Okay. And what are the numbers?

A. The rent in the—I'll call it the old contract was $7,020, and the program rent, the actual program rent of these plaintiffs who signed the leases are $6,812.

Q. So how does that program rent figure compare with the estimate that was in the chart that you prepared in early 1998?

A. The real numbers based on appraisals are much lower. The $11,000 was just an estimate.

Q. When you prepared the chart in early 1998, at what point in the process of coming up with a new rent program were you at?

A. I believe that I presented that to the management. I guess I should put it in context and say I was making a presentation. That chart was just one of several pages. I was meeting with the vice presidents of the former Texaco Company and the former Shell Company and helping them [5] understand where each of the companies were with regard to rent and a couple of other things. And the intent of that chart—well, and so it was very early. I think I'm getting off track here.

Q. Okay. And what were you trying to analyze when you put that chart together?

A. Well, I was trying to communicate and sort of educate the leadership as to what the realities were, and I needed them to understand that Shell had a rent program that was way different certainly than Texaco's, that Shell had very low actual net rents, very low, much below the industry.

Q. Do you remember what the figure was for the net rent based on the VRP program?

A. I do. It was $2,800.

Q. And was that a high rent or a low rent compared to a commercial—

THE COURT: He just told us.

Q. —business rent?

A. Well, compared to a commercial rent, it was much lower than a McDonald's would pay for a corner or charge their franchisees for a corner. It was not only the oil industry but the commercial real estate industry demanded rents—

MR. GREENBERG: Objection, your Honor.

THE COURT: I think he's answered the question. It was much lower than commercial rents.

* * * * *

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

CA No. 01-11300-RWZ

FRANCIS MARCOUX, et al.,
Plaintiffs,

vs.

SHELL OIL PRODUCTS CO. LLC, et al.,
Defendants.

TRANSCRIPT OF JURY TRIAL
DAY TWELVE
December 2, 2004

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* * * * *

[25] MICHAEL JOSEPH ROMAN having been first duly sworn, was examined and testified as follows:

* * * * *

Q. By whom are you employed?

A. I'm employed by Exxon Mobil Corporation.

* * * * *

[26] Q. How long have you worked at Exxon Mobil?

A. I have been with Exxon Mobil for 28 years, Heritage Mobil.

Q. Okay. And when you say Heritage Mobil, what does that mean?

A. Prior to the merger of the two companies at the end of 1999, which was the effective date of the merger, I worked for Mobile Oil Corporation prior to that.

Q. And in the course of your employment with Mobil and then Exxon Mobil, did you have occasion to become familiar with its rent programs for its lessee dealers?

A. Yes, I did.

Q. And how were you able to do that?

A. I was the fuels franchise strategy manager from the time of the merger up until the beginning of this year, and prior to that time, I was also involved in retail programs management and dealer business management, which got me very familiar with the rent programs.

Q. And specifically why did you have to deal with the dealer rent programs in those job functions?

A. They were part of my responsibility.

* * * * *

[27] Q. Let's not talk about today. Let's go back to 2003. Can you tell us what the rent program at Exxon Mobil was at that time?

A. Yes, I can. Effective March 1 of 2003, Exxon Mobil introduced a 12 percent asset-value rent program.

* * * * *

Q. What would the 12 percent apply to?

* * * * *

A. The asset-value programs that we have or the asset-value program that we put into effect on March 1, 2003, was a program that was based on 12 percent of the value of land, building, and improvements at the site.

[28] Q. And before you went to the 12 percent asset-based rent formula, what was the formula that was used?

A. Prior to that, upon the—one year after the merger of the company, we introduced a harmonized rent program that was essentially a 10 percent asset-value program, which was 10 percent of the land, the building, and the improvements.

MR. GREENBERG: Could we please have dates so we know when we're starting from and maybe what it was before?

Q. Can you give us, if you remember, the date when the 10 percent formula was adopted?

A. Approximately January 1 of 2001.

Q. Okay. And why did Exxon Mobil go to the 12 percent asset-based formula?

* * * * *

A. Exxon Mobil went from a 10 percent to 12 percent asset-based rent program because our senior management, and I guess, quite frankly, our shareholders, demanded 12 percent return on the investments that we make in our service station facilities, and we needed 12 percent rate of return in order to be able to get the capital that we need to continue to invest in the sites and keep those sites resilient and viable for the dealers who operate them.

* * * * *

[32] Q. Before it adopted the 12 percent formula, did Exxon Mobil conduct any kind of study of what other companies were doing in terms of their rent programs?

A. Yes, we did.

Q. And do you remember when you did that?

A. We did that study in October—approximately October of 2002.

* * * * *

[33] Q. When the company conducted this comparative study, did it identify any companies that were already at a 12 percent asset-based formula?

* * * * *

[34] A. I believe the question that you asked was, in the course—in the course of our study, did we identify any other companies upon review that had a 12 percent asset-value rent, therefore a 12 percent of land, building, and improvements? And the answer to the question is "yes," that company was Sunoco.

* * * * *

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

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DAY TWELVE
December 2, 2004

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* * * * *

[91] TIMOTHY BROOKS having been first duly sworn, was examined and testified as follows:

* * * * *

[93] Q. Who are you employed by?

A. Cumberland Farms.

Q. And what is Cumberland Farms?

A. Cumberland Farms is a retail convenience store and gasoline supplier of Gulf brand motor fuel.

* * * * *

[95] Q. How long have you been with Cumberland Farms?

A. Since 1989.

Q. Mr. Brooks, are you familiar with the various rental programs, the rental formulas Gulf has used in setting the rents to its dealers?

A. Yes.

Q. Approximately how many lessee dealers do you have?

A. Currently it's approximately 190.

Q. Would you describe the rental formula that was in place during the time period 1998 through 2003?

A. Yes. Cumberland Farms' rental policy was that we would take an objective valuation on a property based upon the highest and best use, and we would apply a rate of return on that. Our rate of return was 11 percent.

Q. There has been testimony about three components of a rent formula, one being for land, one being for improvements, and one being for equipment. What would that 11 percent in your formula be applied to?

A. It would be applied to all three.

Q. So one way we could refer to it is an 11-11-11 program?

A. Yes. We go the other way actually. We group all three [96] components together and say one 11, but, yes, it's the same thing.

* * * * *

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

CA No. 01-11300-RWZ

FRANCIS MARCOUX, et al.,
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TRANSCRIPT OF JURY TRIAL
DAY TWELVE
December 2, 2004

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* * * * *

[110] DENNIS NIELSEN having been first duly sworn, was examined and testified as follows:

* * * * *

[111] Q. By whom are you currently employed?

A. Currently I'm employed by Motiva Enterprises.

Q. How long have you been employed by Motiva?

A. Since, I believe, 1998 when the alliance was formed with Texaco.

Q. And what have your responsibilities been with Motiva since 1998?

A. Since 1998, I have been assigned to manage Shell's wholesale business in the states of Western Massachusetts, Connecticut, and recently New York.

Q. And wholesale is not retail, which is what the lessee dealer class of trade is involved in, correct?

A. Correct. My job is to seek out small independent oil companies and provide the Shell brand to them via contract to their own lessee dealers or—

Q. Prior to the formation of Motiva, by whom were you employed?

A. Shell Oil Company.

Q. And for how long were you employed by Shell?

A. Since I began in 1976.

* * * * *

[119] Q. Now, you presented a renewal lease to Cynthia [Karol] at some point you think in 1994 or 1995?

[120] A. I believe it was something in that time frame, yes. It was surely before I changed to the wholesale portion of the business, I think.

Q. Do you recall any statement to Ms. [Karol] at that time that the VRP was not going to go away—

* * * * *

Q. What did you say about the VRP at that time?

A. I have very little recollection of having said anything in terms of the VRP. I can only speak in general terms of here's how I would address that issue, because that was ten or so years ago, and I can't remember a specific conversation.

* * * * *

A. All right, I believe that Cindy's concern would have been or was about the tenure of the Variable Rent Program, as I understand it. And my answer would have been, taking into consideration how I would normally an-

swer a question like that, I suspect that I would have addressed that by saying that if we look at the Variable Rent Program's tenure, how long it has been around, which I think was since 1982, and [121] see that we still have the program, then it doesn't seem likely that it was going to go away anytime in the near future. However, that is not Shell's policy. Shell's policy is that you are in possession of a letter that says that this program can be terminated with a 30-day notice at any time.

* * * * *

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

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DAY TWELVE
December 2, 2004

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* * * * *

[132] JOHN UMBECK having been first duly sworn, was examined and testified as follows:

* * * * *

[133] Q. Can you tell us where you're currently employed?

A. I'm employed at Purdue University, the Krannert Graduate School of Management at Purdue.

Q. And what is your position there?

A. I'm a professor of economics and currently the chairman of the department.

* * * * *

[141] Q. And what were those issues that you considered?

A. The two that I was asked to look at specifically was the [142] claim that Shell's rent was not consistent with the industry standard and that the price Shell charged their dealers, the DTW or the wholesale price—I don't know how you've been using that term here—

Q. We've been saying DTW.

A. DTW? Okay, that Shell's DTW was not commercially reasonable. That was the gist of the two claims that I looked at.

Q. What did you conclude with regard to those two issues?

A. I concluded that—well, let me stop here. I need to qualify something. The first claim that I looked at was that Shell's rent that they charged the lessee dealers was not consistent with the industry standard, that it didn't meet the industry standard. So before I answer your question, I need to tell you what I mean when I say an industry standard.

From what I've observed in the documents that I've read, the plaintiffs' experts are claiming that the industry standard is—if you can imagine a big white sheet of paper, it's a point on a piece of paper. It's the Mobil, Mobil Oil, their rent. They charged an 8 percent of appraised value rent, and that one point on the piece of paper is the industry standard.

And as somebody who's studied this industry for so long, I would say that that's not a good way to represent an [143] industry standard. I would view an industry standard as a dash, a bar going across that white sheet of paper. It's much broader than a point, and there are people all along that bar, some at each end, some in the middle.

Now, having qualified that, it's my opinion that Shell's rent is within the industry standard. It's on that bar.

* * * * *

Q. Why did you conclude that Motiva's 10-12-12 rent formula was consistent with industry practice?

A. Well, when you take that bar on the piece of paper and you start putting all the different rent programs that different oil companies have on that bar, you find that Shell is on the bar, and it's not at the top end and it's not at the bottom end. It's somewhere in the middle. And that's true consistently through time. I mean, I always have to be a little more specific about a time period, and I know you have been through what I've heard this morning. But that's true in 1998. That's true in 2001. It's true in 2003. So Shell has consistently through time had a rent program that falls within this what I call the industry standard.

Q. What has been your experience with the use of an [144] asset-based rent program in the oil industry?

A. Well, I've had a lot of experience with it from its inception. When I started working in the oil industry doing research and consulting, nobody had an asset-based rent program. They had a variety of different kinds of programs, but none of them were an asset-based rent program. Most of them at that time had a program where the rent was determined by how many gallons of gasoline they sold, and so it might be a 2-cent or a 3-cent per gallon rent. If you sold 100,000 gallons, you might pay $3,000 a month and so on.

That was phased out, and again here you'll see, I think, why I have to call the industry standard a bar rather than a point because it didn't just happen instantaneously. The first company that I know of that went to

an asset-based rent program was Atlantic Richfield, ARCO. And they, by the way, I think were the number one seller in New England until 1985 when they decided they didn't want to be out here anymore. They moved exclusively to the West Coast. But they went to an asset-based rent program prior to 1985.

Then you had Texaco start changing. Mobil was probably next. Then Chevron in about 1997 went to an asset-based rent program, and Shell is probably the last of the major oil companies to go to an asset-based rent program. But that's been my experience.

Q. And what were the reasons why the industry transitioned [145] to an asset-based rent?

A. It's very simple. It used to be that selling gasoline was very profitable. You could make a lot of money at the retail level selling gasoline. But that's—I'll call that the profit margin. Again I apologize because I don't know the terminology you've been using in the courtroom, but the dealer pays a price when he buys it. That's the DTW. And then he sells it at a retail price. And that spread is the profit margin. And those margins used to be quite large. Back in the late '70s and early '80s, they could be 15 or 20 cents a gallon, which is a lot of money per gallon.

Consistently they have fallen. Gasoline margins, profit margins at both the retail level and the refining level fell steadily throughout the 1980s. And by the end of the 1980[s], the oil companies were realizing that they weren't getting much more rent because they had these volume-based rent programs, and they now weren't making very much money on their gasoline, and so they were getting squeezed. And one by one they started adjusting saying, "Look, if we're going to start buying land at these high land price[s] and building modern gas stations and

complying with all the environmental regulations that are very costly, we have to start making money on the land and the buildings because the gasoline profits just aren't there anymore." And so one by one they started transitioning to an asset-based rent so that they [146] could—basically they were a landlord, they became a landlord and charged the rent consistent with what other types of property was renting for.

* * * * *

[147] Q. You testified that you concluded that the 10-12-12 percentage formula that Motiva used was consistent with industry practice; is that right?

A. Yes. Given the way I defined industry practice or industry standard, their rent program falls in that range, yes.

Q. And how did you go about reaching that conclusion?

A. I looked at the other rent programs.

* * * * *

[149] Q. You testified that the way you reached your conclusion was by talking to other companies?

A. In general, yes. Some of these companies I worked for recently, and I have a working familiarity with their rent programs. For example, Chevron, I just worked with them on their rent contracts and had some consulting work on their contracts. The same with ARCO and Cumberland Farms. Where I didn't have a recent association with them, I would call people, some of whom I've known for many years, some I met only recently, but I would ask them what their rent program was.

Q. What time period did you consider in terms of deciding the commercial reasonableness of the 10-12-12 formula?

A. I tried to go back to just prior to the formation of the alliance, so '97, '98. Sometimes they would voluntarily give [150] me information going back farther, but the three specific time periods that I looked at are what's in my report, '98, '01, and '03.

Q. And what did you find with regard to 1998?

A. Well, the table summarizes exactly what my report says. ARCO appraises the land. They use an asset-based rent. They appraise the land at highest and best use. They add 10 percent. They take 10 percent of that as a rent for the land and improvements, okay. And there's an asterisk there. We can come back if you want. We can talk about the subtle differences, but that's in general what they do.

BP/Amoco does the same thing. They appraise the land, its highest and best use and take 10 percent of that, of both the land and the improvements. And in the table we've collapsed improvements and equipment, so instead of seeing it as 10-10-10 or something like that, you just see it as 10-10, but it's basically the same thing.

Chevron, their asset-based rent program appraises the land's highest and best use, and they charge 13 percent. They take a 13 percent factor, multiply the appraised value, divide it by 12 for land and improvements.

Exxon at that time—and that's just prior now to when Exxon Mobil became Exxon Mobil, so they would appraise the land and multiply it by 15 percent.

Gulf/Cumberland Farms, you heard today that back in [151] '98 they were using 11 percent.

Mobil you heard today, back then they were using 8 percent.

Texaco was 10 percent of land and 11.5 percent of improvements.

And we left [S]hell/Motiva blank here because they were in the process of trying to figure out at that time what to do. They did not have an asset-based rent program at that time.

Q. So what conclusion did you reach about whether the 10-12-12 formula would have been consistent with the industry as of the 1998 time period?

* * * * *

A. * * * If you imagine that white piece of paper that I mentioned before with that dash line on it showing sort of what the industry is doing, you'll see that there are some that are lower than 10-12-12, and there are some that are higher than 10-12-12. And going into the deliberations where Shell was formulating now, trying to figure out what is the industry doing in preparation of their [152] decisions on their own rent program, you can see the 10-12-12 would fall within that range.

* * * * *

[Defendants' Exhibit 1246] [Shell Logo]

Station Location: 48 MADISON ST
WORCHESTER, MA 01608
Dealer WIC #22096221985

MOTOR FUEL STATION LEASE

THIS IS A LEASE effective August 1, 1994 between SHELL OIL COMPANY, 400 Blue Hill Drive, Westwood, MA 02090 ("Shell") and SID PRASHAD II, 48 MADISON ST, WORCHESTER, MA 01608 ("Lessee").

PART I of this Lease sets forth the particular provisions of this Lease and includes the executions of this Lease by Shell and Lessee and any Special Provisions that may be applicable, and PART II sets forth the general provisions of this Lease and includes Exhibit A relating to Lessee's maintenance obligations and any Supplements to this Lease which may be referred to in PART I or any such Special Provisions. The provisions of Exhibit A and any such Special Provisions and Supplements shall control to the extent of any conflict between such provisions and the body of this Lease. The numbers in the left column in PART I relate to applicable articles in PART II.

PART I

Article No.

1(h) Leased Premises located at: 48 MADISON ST, WORCHESTER, MA 01608.

3. Term of Lease begins on the effective date specified above and ends on July 31, 1999.

4.1 Premises rent:

Period			Monthly Rent
From Aug. 1, 1994	through	December 31, 1994	$04190
From Jan. 1, 1995	through	December 31, 1995	$04420
From Jan. 1, 1996	through	December 31, 1996	$04620
From Jan. 1, 1997	through	December 31, 1997	$04851
From Jan. 1, 1998	through	December 31, 1998	$05094
From Jan. 1, 1999	through	July 31, 1999	$05349

8(d) Minimum fire legal liability insurance: $300,000.

SPECIAL PROVISIONS: NONE

NOTE TO LESSEE: BE SURE YOU READ AND UNDERSTAND ALL PROVISIONS OF THIS BINDING DOCUMENT BEFORE YOU SIGN, INCLUDING PAGES WHICH FOLLOW.

Executed on the date(s) shown below.

SHELL OIL COMPANY

/s/ S. Prashad
SID PRASHAD II

Date: 07/10/94

By: /s/ B. McClellan
B.F. MCCLELLAN
AREA/TERRITORY MANAGER

Date: 7/15/94

PART II

DEFINITIONS

1. As used in this Lease, whether in the singular or plural:

(a) alteration shall mean any addition or change to, or modification, removal or replacement of, any building, improvement or equipment on the Premises;

(b) business entity shall mean any legal entity which is not an individual, including, without limitation, a partnership, corporation, trust, estate or association;

(c) expiration shall mean the coming to an end of the term provided in article 3, or any extension thereof provided in article 14 or otherwise agreed to in writing by Shell and Lessee;

(d) law shall mean any applicable statute, constitution, ordinance, regulation, rule, administrative order or other requirement of any federal, state or local government agency or authority, which, unless otherwise specified herein, is in effect either at the time of the execution of this Lease or any other time during the term;

(e) maintenance or maintain shall mean, unless the context otherwise indicates, preventive maintenance, repairs, replacement, repainting and cleaning;

(f) nonrenewal shall mean a failure by Shell to continue or extend this Lease at the conclusion of the term provided in article 3, or of any extension thereof provided in article 14 or otherwise agreed to in writing by Shell and Lessee;

(g) PMPA shall mean the Petroleum Marketing Practices Act (15 U.S.C. [§] 2801 *et seq.*);

(h) Premises shall mean collectively the land owned or leased by Shell at the location identified in PART I, to

the extent improved by Shell or with Shell's written consent for use as a motor fuel dispensing station and for associated purposes, and the buildings, improvements and equipment now or hereafter located on the land; and

(i) termination shall mean the ending of the term for any reason before expiration, as defined herein.

LEASE

2. Shell hereby Leases to Lessee, and Lessee hereby leases from Shell, the Premises. Subject to article 6.2, Lessee acknowledges that the Premises are in good and safe condition and repair. Upon any termination or expiration of this Lease, Lessee shall peaceably surrender possession of the Premises to Shell in as good order and condition as when delivered to Lessee, excepting ordinary wear and tear, acts of God and maintenance for which Shell is responsible.

TERM—TERMINATION

3. This Lease shall be binding from execution and shall be in effect for the term set forth in PART I, unless extended pursuant to article 14 or otherwise by written agreement, but may be terminated by Lessee at any time by giving Shell at least 90 days' notice, or may be terminated by Shell as provided in the succeeding articles hereof.

RENT

4.1 General. Lessee shall pay Shell as rent for each calendar month, without deduction, set off, notice or demand, the sum specified in the schedule as set forth in PART I, in advance not later than the first day of such month, except that rent due on a weekend or federal holiday will be payable on the business day next following the due date. Rent for any period less than a calendar month shall be prorated. In addition to the rent specified

above, Lessee shall pay or reimburse Shell for, in accordance with law, all taxes which may be imposed on the rental of any real or tangible personal property included under this Lease, including any such taxes imposed for any prior periods in which Lessee leased the Premises from Shell. For the purpose of determining any such taxes due, Shell shall have the option at any appropriate time of identifying the tangible personal property included under this Lease and allocating thereto a portion of the rental hereunder.

4.2 Payment. Rent shall be deemed paid when received by Shell at its address provided by Shell to Lessee from time to time. Shell may at its option from time to time prescribe that rent be paid when due by draft or electronic funds transfer initiated by Shell, and Lessee shall provide any written authorization required for such purpose.

USE

5.1 General. The Premises shall be used for operation of the motor fuel dispensing station and associated facilities existing on the effective date of this lease or thereafter completed or installed by Shell or with Shell's written consent. Authorized use shall include the retail sale of petroleum products and carry-out automotive accessories but exclude any automotive repairs or services except such incidental services as are normally provided to vehicles receiving motor fuel while at the motor fuel dispensing driveway area (such as checking oil and coolant levels and cleaning windshields). Authorized use shall also include the operation of any convenience store, foodmart, car wash or other non-gasoline facility on the Premises according to standards established by Shell for such facility. Except with the prior written consent of Shell, which may be withheld consistent with applicable law, Lessee

may not use underground tanks, associated product lines or motor fuel dispensing equipment provided by Shell in the sale or dispensing of non-Shell motor fuel. Lessee's installation and use of any additional tanks and associated equipment for the purpose of selling non-Shell motor fuel shall be subject to article 5.6 and all other applicable provisions of this Lease and any related agreements between Shell and Lessee. If, with Shell's prior written consent, the Premises are used for any purpose in addition to the use provided for in the Lease and any related agreements between Shell and Lessee, Shell may charge a reasonable additional rent as compensation for such use.

5.2 Lessee's Efforts—Hours. Lessee shall devote Lessee's best efforts to preserve the value of the Premises for the foregoing authorized use by serving effectively the public's and consumers' needs, and shall keep the station open for the sale of motor fuel and fully illuminated during such hours each day and days each week as shall be necessary to assure that end, having due regard to prior practice, competitors' current practice, vehicular traffic patterns, customer convenience, availability of motor fuels and other customary criteria followed by Shell. Lessee shall personally and actively manage the business conducted at the Premises to assure good faith compliance with this article 5.2 and other provisions of this Lease.

5.3 Use Prevented by Law. Either Shell or Lessee [may] terminate this Lease on giving the other notice (or advance notice if and as required by law) if at any time any law shall operate or be enforced so as to prevent the continued use or occupancy of the Premises (either directly or by requiring specified alterations at a cost which is disproportionate to the value of the Premises for such

continued use or occupancy) for the purpose for which such Premises were being used immediately prior to the effectiveness, application or enforcement of such law, as the case may be.

5.4 Business Charges—Lawful Operations. Lessee shall satisfy all regulatory requirements and timely pay all charges incident to the ownership, possession or use of the Premises, the business conducted thereon, or the protection of the environment pertaining thereto, including all federal, state and local taxes, levies, assessments and charges (except ad valorem taxes on Shell's property and taxes based upon the net income of Shell); all license, registration, permit, occupation and inspection taxes and fees; all water, sewer, waste disposal, gas, electricity, telephone and other utility charges; and all taxes on Lessee's property on the Premises. Without limitation of the foregoing, Lessee shall comply with all laws, licenses and permits relating to the Premises or any use thereof or to any act or activity on the Premises, including, without limitation, any special zoning or other governmental restrictions specified in PART I and any such laws, licenses or permits pertaining to environmental protection. All licenses, permits and accounts required for the foregoing shall be in Lessee's name unless Shell, in its discretion, directs otherwise. If Shell at any time satisfies any such regulatory requirements or bears any such charges, Lessee shall reimburse Shell upon demand for Shell's costs so incurred, without prejudice to any other rights or remedies available to Shell hereunder or by law. Lessee shall not (a) commit or permit any fraudulent or illegal act or activity or any consumption of intoxicating beverages or use of illegal drugs on the Premises, or (b) maintain or permit any animal or condition on the Premises

which may endanger the health, safety or well-being of persons on the Premises.

5.5 Shell Alterations. Subject to the remaining provisions of this article 5.5, Shell shall have the right from time to time, without liability to Lessee, to make alterations to the Premises. Shell's right to make such alterations shall include, but not be limited to, modernization, reconstruction or remodeling of or adding to any buildings, equipment or other facilities on the Premises, and may involve the complete demolishing and rebuilding of any and all such facilities. If any such alteration will cause a substantial disruption or change in Lessee's business, Shell will provide Lessee with 90 days' advance notice of the terms of its proposal to make the alteration, or such shorter notice as may be reasonable in any emergency situation, and during the period of such alteration work Shell shall reduce or suspend the rent payable hereunder as full compensation for the restrictions in use of the Premises resulting from such work. Shell shall exercise due diligence to complete all such alteration work in an expeditious manner, but Shell shall not be liable to Lessee for any loss of profit or other loss resulting from the conduct of the work or any completion delay except for an adjustment of rent as provided above. Upon completion of such alteration work, the rent hereunder will be appropriately adjusted if a change in the rental value of the Premises has resulted therefrom.

5.6 Lessee Alterations. Lessee shall not make any alterations to the Premises, including removal or disablement of leak detectors or other environmental control devices, without Shell's prior written consent, which consent shall not be unreasonably withheld. Any such alteration to which Shell may give its consent shall be made in accordance with plans and specifications and by a con-

tractor approved by Shell, which approval shall not be unreasonably withheld. Except as otherwise agreed in writing by Shell, at any termination or expiration of this Lease any alteration made by Lessee shall, at Shell's election, become a part of the Premises and the property of Shell or Shell may require Lessee within 30 days before or after termination or expiration to remove such alteration and restore the Premises to their condition existing prior to such alteration.

MAINTENANCE

6.1 General. Subject to the following provisions of this article 6, Lessee shall at all times maintain the Premises (including adjacent sidewalks and driveways, easements and all landscaped area) and Lessee's own property and equipment thereon in good condition and repair, and keep the same neat, clean, safe and orderly. To those ends and always promptly as needed, Lessee shall perform the maintenance of Shell's property (or any of Lessee's property) which is specified in Exhibit A hereto, including any such maintenance as may be required by law unless Shell is expressly required by the same or other law to bear the cost thereof. Shell shall perform all other maintenance to Shell's property which Shell deems necessary or desirable (having due regard to the remaining term of this Lease and Shell's future plans for the Premises), provided that Lessee promptly gives Shell a written statement of each such maintenance which Lessee deems necessary. As to any maintenance concerning which Lessee fails to give Shell the above-required written statement, or which is necessitated, either partly or solely, by any negligent or otherwise wrongful act or omission of Lessee or Lessee's employees, agents or contractors: Shell may perform the same and charge to Lessee Shell's actual cost thereof, or in lieu of performing the

same, may charge to Lessee what would have been the reasonable cost thereof. If the Premises are made substantially unfit for the intended use hereunder by any cause, either Shell or Lessee may terminate this Lease by giving the other notice (or advance notice if and as required by law) within 60 days after such unfitness commences. Shell may enter the Premises at any time for the purposes of inspecting the same (including the pump meters), gauging and testing tanks, performing maintenance and making alterations. The termination or expiration of this Lease shall not relieve Lessee of any obligation for maintenance theretofore accrued.

6.2 Initial Maintenance. Within 10 days after the effective date of this Lease, Lessee may provide Shell a written statement of any maintenance for which Shell or any previous lessee (other than Lessee herein or any third party through whom Lessee claims an interest hereunder) may be responsible, and the preceding provisions of this article 6 shall apply to such maintenance. Lessee shall be responsible for any maintenance required on such effective date regarding which Lessee fails to give Shell a written statement as above provided, and Shell shall be relieved of all responsibility therefor.

6.3 Dealer Inventory Control. To assure early detection of any leak in the underground motor fuel storage system at the Premises, Lessee shall maintain methodical daily inventory control, including daily reconciliation of physical inventory readings with sales records and delivery receipts, in accordance with Shell's procedures and applicable law. Lessee shall give Shell immediate telephone notification (promptly confirmed by written notice) of any suspected product loss, of any claim or threatened claim by a third party related to a product loss or alleged loss, or of any newly discovered material fact relating to any

matter previously reported pursuant hereto. Without limitation of the foregoing, Lessee shall provide such notification to Shell of any inventory discrepancies for a single product (losses or gains) in excess of: (a) 300 gallons for a single day, (b) 150 gallons per day for three consecutive days (all losses or all gains) or (c) one-half of one percent (1/2 of 1%) of sales for any 30-day period. Shell, at its option from time to time, may require Lessee to provide Shell periodic written certifications that Lessee has complied with the foregoing provisions of this article 6.3. Lessee shall retain for a period of at least one year and make available to Shell for inspection and audit, at all reasonable times, Lessee's records and procedures maintained pursuant to this article 6.3. If Lessee refuses or fails to perform in a proper and timely manner Lessee's obligations under this article 6.3, Shell may, at its option and without limitation of any other rights or remedies available to it under this Lease or otherwise, (a) retain the services of a qualified independent third party to inspect and audit Lessee's performance as frequently as necessary, at the sole cost of Lessee, until such deficiencies are cured or (b) terminate or not renew this Lease and any related agreements constituting a franchise between Shell and Lessee.

INDEMNITY—REPORTS

7. TO THE FULLEST EXTENT PERMITTED BY LAW (BUT NO FURTHER) AND WITHOUT IN ANY WAY LIMITING ANY OF LESSEE'S OBLIGATIONS UNDER ARTICLE 8 OF THIS LEASE, LESSEE SHALL DEFEND, INDEMNIFY AND HOLD HARMLESS SHELL, ITS PARENT, AFFILIATE AND SUBSIDIARY COMPANIES AND THEIR RESPECTIVE DIRECTORS, EMPLOYEES AND AGENTS AGAINST ALL CLAIMS, SUITS, LIABILITIES,

JUDGMENTS, LOSSES AND EXPENSES (INCLUDING, WITHOUT LIMITATION, ATTORNEYS' FEES AND COSTS OF LITIGATION, WHETHER INCURRED FOR SHELL'S PRIMARY DEFENSE OR FOR SHELL'S ENFORCEMENT OF ITS INDEMNIFICATION RIGHTS HEREUNDER) AND ANY FINES, PENALTIES AND ASSESSMENTS ARISING OUT OF ANY BODILY, PERSONAL INJURY, DISEASE OR DEATH OF ANY PERSONS OR DAMAGE TO OR LOSS OF ANY PROPERTY (EXCEPT SHELL PROPERTY TO THE EXTENT SHELL HAS RESPONSIBILITY THEREFOR UNDER ARTICLE 6) OR FOR LIENS ON THE PREMISES, CAUSED BY OR HAPPENING IN CONNECTION WITH THE PREMISES (INCLUDING ADJACENT SIDEWAYS OR DRIVEWAYS) OR THE CONDITIONS, MAINTENANCE, POSSESSION OR USE THEREOF OR THE OPERATIONS THEREON, EVEN THOUGH CAUSED BY THE CONCURRENT OR CONTRIBUTORY NEGLIGENCE OR FAULT OF A PARTY INDEMNIFIED, BUT EXCEPTING ANY SUCH INJURY, DISEASE, DEATH, DAMAGE OR LOSS CAUSED BY (A) THE SOLE NEGLIGENCE OR FAULT OF A PARTY OTHERWISE INDEMNIFIED OR (B) DEFECTS IN SHELL PRODUCTS NOT CAUSED OR CONTRIBUTED TO BY ANY NEGLIGENCE OR FAULT OF LESSEE OR LESSEE'S EMPLOYEES, AGENTS OR CONTRACTORS, WITHIN 24 HOURS AFTER ANY OCCURRENCE WHICH MAY RESULT IN SUCH INJURY, DISEASE, DEATH OR LOSS, OR SUCH FINE, PENALTY OR ASSESSMENT, OR THE IMPOSITION OF SUCH LIEN, LESSEE SHALL REPORT THE SAME TO SHELL BY TELEPHONE AND SHALL PROMPTLY THEREAFTER CONFIRM THE SAME BY NOTICE

INCLUDING ALL CIRCUMSTANCES THEREOF KNOWN TO LESSEE OR LESSEE'S EMPLOYEES. SHELL SHALL HAVE THE RIGHT, BUT NOT THE DUTY, TO PARTICIPATE IN THE DEFENSE AND SETTLEMENT OF ANY SUCH CLAIM OR LITIGATION WITH ATTORNEYS OF SHELL'S SELECTION WITHOUT RELIEVING LESSEE OF ANY OBLIGATIONS HEREUNDER. LESSEE SHALL COOPERATE WITH SHELL IN SHELL'S INVESTIGATION AND DEFENSE OF ANY CLAIM OR SUIT. LESSEE'S OBLIGATIONS HEREUNDER SHALL SURVIVE ANY TERMINATION OR EXPIRATION OF THIS LEASE.

INSURANCE

8. Without in any way limiting any of Lessee's obligations, indemnities and liabilities under article 7 of this Lease or otherwise, Lessee shall maintain, at all times, at Lessee's expense and in compliance with any applicable requirements of law, insurance satisfactory to Shell of the following minimum types and limits:

(a) Workers' Compensation Insurance with statutory limits, and Employers' Liability Insurance with limit of $100,000 each occurrence. Such insurance shall include a waiver of the insurer's rights of subrogation against Shell.

(b) Comprehensive General Liability Insurance (including, without limitation, coverage for premises/operations, operation of vehicles owned, non-owned or hired, products/completed operations, and contractual obligations assumed in article 7 hereof) with a combined limit for bodily/personal injury and property damage of $300,000 each occurrence. If Lessee sells or dispenses alcoholic beverages, such insurance shall include coverage for such activity with a minimum limit of $300,000

each occurrence. Such insurance shall name Shell and any lessor from whom Shell may lease the Premises as additional insureds.

(c) Environmental Impairment Liability Insurance covering off-site losses, which will be maintained during any period and with such minimum limit as shall reasonably be required by Shell, either initially from the effective date hereof or at any time thereafter, having due regard to the availability of such insurance during any such period. Except with respect to any initial requirement for such insurance which may be specified in PART I, Shell shall give Lessee at least 90 days' notice of any new or modified requirement for such insurance. Such insurance shall include Shell as a named insured.

(d) Fire Legal Liability Insurance on the leased building and any other property on the Premises leased or loaned by Shell to Lessee (whether under this Lease or otherwise), in the minimum amount set forth in PART I or in such modified amount as Shell may specify by notice to Lessee at any time based on alterations made after the effective date hereof.

Any insurance maintained by Lessee pursuant to this Lease shall be regarded as primary insurance underlying any other applicable insurance. Prior to the effective date of this Lease and thereafter prior to the expiration of any required insurance, Lessee shall provide Shell with evidence satisfactory to Shell showing that the insurances specified above are in effect and will not be cancelled or materially changed without at least 30 days' prior written notice to Shell. Lessee shall further provide Shell with at least 30 days' prior written notice if any such insurance shall expire for any reason without being replaced with equivalent coverage. Any insurance plan arranged by Shell and participated in by Lessee may

provide for the periodic collection by Shell for the Insurer of Lessee's premiums as payments due under this Lease.

ASSIGNMENT—SUBLEASING—ENCUMBRANCE

9.1 General. This Lease is personal to Lessee. Except as otherwise provided in this article 9 or by law, Lessee shall not assign or encumber any of Lessee's interest in this Lease or in the Premises, or sublease all or any part of the Premises; or permit any other arrangement having similar effect of such an assignment or sublease, or permit any other person to occupy or use all or any part of the Premises, either voluntarily, involuntarily or by operation of law, without Shell's prior written consent, which consent shall not be unreasonably withheld. Each request for Shell's consent to any assignment, encumbrance or sublease shall be submitted in the manner specified for notices in article 13.1, and Shell shall have 60 days (or any lesser period specified by law) following its receipt of all qualification information reasonably required by it in which to grant or withhold is consent in writing. No consent to any assignment, encumbrance or sublease shall constitute a waiver of the provisions of this article as to any such future transaction. Any assignment, encumbrance or sublease made without Shell's prior written consent or otherwise in violation of this Lease shall be null and void.

9.2 Particular Acts. Without limitation, each of the following acts shall be considered an assignment subject to article 9.1:

(a) The transfer of Lessee's interest in this Lease upon death, whether by will or operation of law.

(b) Lessee becomes bankrupt or insolvent, makes an assignment for the benefit of creditors or institutes a pro-

ceeding under the Bankruptcy Code; provided that, in any of the foregoing cases, Lessee or other affected party shall have 60 days in which to have an involuntary proceeding dismissed.

(c) A writ of attachment or execution is levied on this Lease and not removed by Lessee within 30 days.

(d) In any proceeding or action to which Lessee is a party, a receiver is appointed with authority to take possession of the Premises and such receiver is not removed within 60 days.

(e) If Lessee is a partnership, a withdrawal or any change of interest (voluntary, involuntary or by operation of law) of any partner, or the dissolution of the partnership.

(f) If Lessee is a corporation, any dissolution, merger, consolidation or other reorganization, or other arrangement having similar effect, or the sale or transfer by Lessee or any shareholder of 10% or more of the voting shares of the capital stock of Lessee or of any lesser interest which cumulatively vests 10% or more of such voting shares in the transferee.

(g) If Lessee is composed of more than one person, any change of interest (voluntary, involuntary or by operation of law) of any such person.

9.3 Shell's First Refusal Right. Lessee may not sell, transfer or assign any of Lessee's interest in this Lease without first offering in writing to sell, transfer or assign the same to Shell or its designee on terms and conditions which are the same as those of the proposed sale, transfer or assignment to the third party. If Shell declines or does not accept the offer within 30 days from its receipt thereof and of a complete and exact copy of such third party offer, Lessee may make the proposed sale, transfer

or assignment to such third party if Shell gives its consent thereto as provided in article 9.1 hereof, but not at a lower price or on more favorable terms than those so offered to Shell. If such sale, transfer or assignment to such third party is not consummated within four months from Shell's receipt of the foregoing offer to it, Lessee shall re-offer the interest to Shell in accordance with the foregoing provisions. If Lessee is a partnership or corporation, the provisions of this article 9.3 shall be deemed to apply to any assignment described in article 9.2(e) or 9.2(f), as the case may be.

9.4 Assignment by Shell. Shell shall have the right to sell, transfer or assign its interest in this Lease and the Premises. Following any assignment of this Lease by Shell, Shell's assignee shall be substituted for Shell with respect to the rights and obligations of Shell provided herein.

TERMINATION OR NONRENEWAL BY SHELL—OTHER REMEDIES

10.1 Termination. Subject to any limitations imposed by law, Shell may, at its option, terminate this Lease upon notice (or advance notice if and as required by law) to Lessee for any one or more of the following grounds:

(a) failure by Lessee to comply with any provision of this Lease, which provision is both reasonable and of material significance to the relationship hereunder;

(b) failure by Lessee to exert good faith efforts to carry out the provisions of this Lease;

(c) occurrence of an event which is relevant to the relationship hereunder and as a result of which termination of this Lease is reasonable, including events such as:

(1) fraud or criminal misconduct by Lessee relevant to the operation of the Premises;

(2) declaration of bankruptcy or judicial determination of insolvency of Lessee;

(3) continuing severe physical or mental disability of Lessee of at least three months' duration which renders Lessee unable to provide for the continued proper operation of the Premises;

(4) loss of Shell's right to grant possession of the Premises through expiration of an underlying lease;

(5) condemnation or other taking, in whole or in part, of the Premises pursuant to the power of eminent domain;

(6) destruction (other than by Shell) of all or a substantial part of the Premises;

(7) failure by Lessee to pay to Shell in a timely manner when due rent and other sums to which Shell is legally entitled;

(8) failure by Lessee to operate the Premises for the sale of motor fuel for seven consecutive days, or such lesser period which under the facts and circumstances constitutes an unreasonable period of time;

(9) willful adulteration, mislabeling or misbranding of motor fuels or other trademark violations by Lessee;

(10) knowing failure of Lessee to comply with federal, state or local laws or regulations relevant to the operation of the Premises;

(11) conviction of Lessee of any felony involving moral turpitude; and

(12) death of Lessee, or if Lessee is a partnership or corporation, death of any partner or shareholder, as the case may be, who owns at least a 50% interest in Lessee, or who owns a lesser interest of at least 25% and is active in the management of Lessee;

(d) a determination is made by Shell in good faith and in the normal course of business to withdraw from marketing of motor fuel through retail outlets in the relevant geographic market area in which the Premises are located; and

(e) any other ground for which termination is provided for in this Lease or in any related agreements constituting a franchise between Shell and lessee, or is otherwise allowed by the PMPA or other applicable law.

10.2 Termination Prior to Effective Date. If, after execution but prior to the effective date of this Lease, Shell has grounds to terminate or not renew any then existing Motor Fuel Station Lease between Shell and Lessee covering the Premises, or to terminate this Lease as if it were then in its term, Shell may terminate this Lease, as well as any such then existing lease, based on such grounds.

10.3 Nonrenewal. Subject to article 14 and any limitations imposed by law, Shell may, at its option, fail to renew this Lease or any franchise relationship existing with respect thereto upon notice (or advance notice if and as required by law) to Lessee for:

(a) any one or more of the grounds specified in article 10.1(a) through 10.1(d); and

(b) any other ground for which nonrenewal is provided for in this Lease or in any related agreements constituting a franchise between Shell and Lessee or is otherwise allowed by the PMPA or other applicable law.

10.4 Acts Attributable to Lessee. In determining whether a ground for termination or nonrenewal exists under this article 10: the acts or omissions of Lessee's employees, agents and contractors shall be deemed to be the acts or omissions of Lessee, and (a) if Lessee is composed

of more than one person, the acts or omissions of each such person shall be deemed to be the acts or omissions of Lessee, or (b) if Lessee is a partnership or corporation, the acts or omissions of the Key Management Person designated in PART I if any, and of each partner or shareholder, as the case may be, shall be deemed to be the acts or omissions of Lessee.

10.5 Other Remedies. Following any termination or the expiration of this Lease, (a) Shell may re-enter and repossess the Premises, without limitation of any other rights or remedies available to it under this Lease or otherwise, and (b) Lessee shall peaceably surrender the Premises to Shell as to any of Lessee's property which Lessee fails to remove from the Premises at the termination or expiration of this Lease. Shell shall have the right to sell all or any part of same for Lessee's account on such terms as Shell may desire, but with the rights in Shell to apply the proceeds of such sale, after reimbursing itself for the costs thereof, to the payment of any indebtedness of Lessee to Shell, and to purchase any or all such personal property. All sums due by lessee to Shell under the provisions of this Lease shall be payable by Lessee to Shell as provided herein, and shall bear interest at the rate of 10% per annum (or lesser maximum rate permitted by law) from the date due until paid. Either party's right to require strict performance of the other's obligations hereunder shall not be affected by any previous waiver, forbearance, course of dealing or trade custom or usage.

UNDERLYING ESTATES—CONDEMNATION

11. If Shell does not own the Premises, this Lease (a) is subject to all conditions or restrictions affecting the lease under which Shell is now entitled to possession, including, but not limited to, any special conditions or restric-

tions specified in PART I; and (b) shall terminate upon expiration or any sooner termination (by Shell or otherwise) of such lease if and as permitted by law, and Lessee shall not commit or permit any act or omission which would impair or jeopardize Shell's interest under its lease. If all or any part of the Premises is condemned for public or quasi-public use as provided in article 10.1(c)(5), or is (as it may be) voluntarily conveyed by Shell to any party having and intending to exercise the power so to condemn, either Shell or Lessee may terminate this Lease by giving the other notice (or advance notice if and as required by law); and whether or not this Lease is so terminated, Lessee assigns to Shell all of Lessee's right or interest in any award or settlement for such condemnation or conveyance in lieu thereof subject to any applicable requirements of the PMPA, provided that Lessee shall retain the right hereunder to pursue directly against the condemning party any claim Lessee may otherwise have under applicable law to receive compensation for business relocation expense or for loss of business opportunity or good will.

LESSEE'S BUSINESS

12. Nothing in this Lease shall be construed as reserving to Shell any right to exercise any control over, or to direct in any respect the conduct or management of, the business or operations of Lessee on the Premises; but the entire control and direction of such business and operations shall be and remain in Lessee, subject only to Lessee's performance of the obligations of this Lease. Neither Lessee nor any person performing any duties or engaged in any work on the Premises for or on behalf of Lessee shall be deemed an employee or agent of Shell, and none of them is authorized to impose on Shell any obligations or liability whatever. Except as provided by

law, nothing in this Lease, or now or ever hereafter on or part of the Premises, shall be construed as granting to Lessee any franchise, license or other right to use any of Shell's trademarks, brand names, service marks or color scheme and Shell reserves the right to remove or obliterate any thereof now or ever hereafter on or part of the Premises as to which Lessee does not have the right of use under any separate agreement.

NOTICES

13.1 General. Except as otherwise specified herein, every notice hereunder shall be in writing and subject to any requirements of law, may be given to Lessee by personal service or to either Lessee or Shell by certified letter, telegram, electronic mail, mailgram, or overnight or local courier and, in the latter instances, shall be deemed given when the letter is deposited in the U.S. mail or the telegram or other such communication is deposited with the dispatching agency, postage or charges prepaid, and directed to the party for whom intended at such party's address first herein specified, or at such other address as such party may have substituted therefor by notice so given to the other.

13.2 Personal Service—Business Entity or Joint Lessee. If Lessee is a business entity, Shell may give notice by personal service on (a) the Key Management Person designated in PART I pursuant to article 16.3, if any, (b) any officer or director of a corporation, (c) any partner of a partnership or (d) any personal representative, agent or employee of any other business entity. If Lessee is composed of more than one person such notice may be given to any such person who is an individual or to any such person who is a business entity in the manner provided next above.

CONTINUATION OF RELATIONSHIP

14. Neither Shell nor Lessee shall have any obligation to renew this Lease or continue their relationship established hereunder beyond the term provided in article 3, or any extension thereof agreed to in writing by Shell and Lessee, except if and as required by law. If by operation or effect of law Shell is required to continue its relationship established hereunder with Lessee beyond the term specified in article 3 and the parties fail to extend or renew this Lease by written instrument, then the term of this Lease shall be extended on a month-to-month basis on the same terms and conditions as were last provided in this Lease for not more than six successive months, subject (a) to termination by either party as herein provided or (b) to nonrenewal by Shell at the end of any such month.

RELATION TO EXISTING LAW

15. To the extent that any provision of this Lease is in conflict with any valid and enforceable law existing on the effective date hereof, such provision shall be deemed amended to conform with such law as it applies to this Lease at the time either party takes any action or exercises or claims any right under such provision.

BUSINESS ENTITY OR JOINT LESSEE

16.1 General. This article shall apply if Lessee is a business entity or composed of more than one person (i.e., any combination of individuals and business entities).

16.2 Joint and Several Obligations. If Lessee is composed of more than one person, the obligations imposed hereunder shall be joint and several as to each such person, and all such obligations shall be deemed to apply to each such person with the same effect as though such person were the sole Lessee.

16.3 Personal Obligations and Provisions. If Lessee is a business entity, all obligations and provisions hereof of a personal nature shall apply as if such business entity were an individual, and shall also apply insofar as is legally possible and reasonably practicable to those individual persons who have or exercise management responsibility for such business entity, including, without limitation, officers, directors or agents of corporations and partners of partnerships. Such business entity shall manage its affairs with respect to the personal obligations and provisions in a manner so as to give full force and effect to same. If Lessee as a business entity has initially designated in PART I or subsequently designates a "Key Management Person" who has or exercises primary management responsibility for Lessee's day-to-day operations, Shell shall be entitled to look to such designated Person in connection with the application of such obligations and provisions of a personal nature. Subject to Shell's prior written approval, which shall not be unreasonably withheld, Lessee may at any time, as appropriate, initially designate or make a substitute designation of a Key Management Person.

EXCUSES FOR NON-PERFORMANCE

17. Either Shell or Lessee shall be excused from its obligations under this Lease (except financial) to the extent that performance is delayed or prevented by any circumstances reasonably beyond such party's control or by fire, explosion, mechanical breakdown, strikes or other labor trouble, plant shutdown, riots or other civil disturbances, or voluntary or involuntary compliance with any law, regulation or request of any governmental authority. Any nonperformance excused under this article 17 shall not deprive either Shell or Lessee of any remedy otherwise existing under article 10 hereof or the PMPA.

ENTIRETY—EXECUTION—SUCCESSION

18. This Lease terminates, as of its effective date, any prior lease by Shell to Lessee of the Premises, and merges and supersedes all prior representations and agreements, and constitutes the entire contract between Shell and Lessee concerning the subject matter or in consideration hereof. Neither this Lease nor any subsequent agreement amending or supplementing this Lease shall be binding on Shell unless and until it is signed for Shell by a duly authorized representative. Subject to the foregoing provisions hereof, this Lease shall bind and benefit Lessee's heirs, estate and assigns, and Shell's successors and assigns.

Exhibit A

to Motor Fuel Station Lease

LESSEE'S MAINTENANCE OBLIGATIONS
(SEE ALSO ARTICLES 1(e) AND 6)

(Note: "Maintain" includes repairs and replacement unless otherwise stated)

A. Yard

1. Maintain all elements within planter areas as necessary to retain a healthy and attractive appearance. Items include, but are not limited to, all live and artificial plantings (shrubs, grass, flowers, trees, etc.), decorative rock, bark and the entire sprinkler system.
2. Regularly remove weeds, leaves, debris and litter from the Premises (including rain gutters and downspouts and adjacent sidewalks, driveways and easements).
3. Remove snow and ice from the Premises (including adjacent sidewalks, driveways and easements).

B. Lighting

Maintain all lamps and bulbs, ballasts, ballast wiring, starters and sockets in the interior of building. Excludes total fixture replacement.

C. Plumbing

1. Clear clogged toilets, sinks, building lube bay drains and on-property sewer lines. Clean oil separators and catch basins.
2. Maintain all flush mechanisms and faucets.
3. Drain water lines to prevent freezing.
4. Empty septic tanks as necessary.

D. Heating/Air Conditioning

Provide seasonal inspection and service for heating and A/C systems (to include: tighten belts, lubricate bearings, clean/adjust furnace burners, add air conditioner refrigerant) and replace air filters. Maintain any window air conditioner units in entirety.

E. Glasswork

Replace all window and door glass, whenever scratched, cracked or broken from whatever cause. Includes bullet-resistant glass or plastic.

F. Floors

Restore floors to original condition upon removal of equipment installed by or at request of Lessee, subject to normal wear and tear.

G. Painting

During the interval between periodic general repainting by Shell, wash and paint all curbs, yard and building equipment, interior/exterior walls, doors, ceilings and shelving as necessary. Paint to be furnished by Shell; all other painting materials by Lessee.

H. Tanks

1. Check daily for leakage and water using water-finding paste. Maintain daily inventory control as specified in article 6.3. (Failure by Lessee to monitor tanks daily for contaminates and product loss may expose Lessee to responsibility for lost product and payment of Shell's cleanup or repair costs, or both).
2. Empty waste oil tank, using legally acceptable method of disposal. Obtain and pay for necessary regulatory permits for proper disposal and maintain document records as required by law.

3. Keep fills and access boxes clear of ice, snow, water and debris.

I. Pumps/Dispensers

1. Lubricate any gasoline suction pumps in use (where motor and pump are contained in dispenser housing). Lubricate suction pump weekly or per manufacturers recommendations.
2. Maintain gasoline hoses, clamps, retractor cable, nozzles, swivels and colored scuff guards, including any associated with a vapor recovery system; check daily for visible leaks.
3. Maintain air and water hoses, nozzles, couplings and air chucks.

J. Air Compressor

Drain water daily. Add/change oil, replace air filters and lubricate bearings per manufacturer's specifications.

K. C-Store/Food Mart and Related Equipment (if located on Premises)

1. Maintain Shell-owned cooler/freezer doors and refrigeration units (walk-in and freestanding), gondolas and all other Shell-owned C-store/food mart related equipment, including lamps, ballasts, fuses and glass therein.
2. Keep all food handling equipment and food preparation areas clean, sanitary and in compliance with applicable codes and laws.
3. Keep all equipment drain lines clean and clear.

L. Car Wash Equipment (if located on Premises)

Maintain all elements of Shell-owned car wash equipment, including any optional or add-on equipment

systems with control and connection hardware, and all elements of any water reclaim system. This excludes complete equipment package replacements.

M. Other Equipment

1. Maintain all lessee-owned equipment.
2. Furnish and maintain portable fire extinguishers.

N. Miscellaneous

1. Maintain all building locks, keys, door closers and latches.
2. Maintain all elements of overhead doors, excluding total door replacement.
3. Reset circuit breakers, replace electrical fuses.
4. Keep restrooms at all times neat, clean, safe and orderly, free of offensive odors and well-stocked with proper supplies and cleaning materials.
5. Take all necessary pest control measures.

[Defendants' Exhibit 1249]

MOTIVA
ENTERPRISES LLC
Shell, Texaco & Saudi Aramco Working Together

Retailer #: 550525
Cost Center #: 137898

RETAIL FACILITY LEASE

THIS LEASE is entered into between Motiva Enterprises LLC ("Lessor") whose address is 12700 Northborough Drive, Houston, TX 77067, and SID PRASHAD II ("Lessee") whose address is 48 MADISON STREET, WORCESTER, MA 01608 and is effective on the later of the first day of the month following execution of this Lease by Lessee or the day after the original expiration date printed in Lessee's current lease with Lessor prior to any extensions thereof ("Effective Date").

This Lease is comprised of two parts. PART I sets forth the variable provisions of this Lease and references the applicable articles in PART II that sets forth the general provisions. To the extent there is a conflict between PART I and PART II, the provisions in PART I are controlling.

PART I

Article No.

1(e) Leased Premises are located at: 48 MADISON ST, WORCESTER, MA 01608.

3 This Lease begins on the Effective Date specified above and expires 3 years after the Effective Date on 7/31/03 ("Expiration Date"). Lessee authorizes Lessor to insert in this Lease the date certain for the Expiration Date pursuant to the definition of Effective Date above.

4 Rent: Lessee shall pay Lessor the following monthly base rentals, plus an amount adjusted at the end of each 12-month period as described in this article:

Months 1 – 12:	$4,040.00
Months 13 – 24:	$4,278.00
Months 25 – 36:	$4,515.00

21 Notice – Underlying lease(s): The Premises are subject to an underlying lease(s) that will expire on N/A; provided, however, the underlying lease(s) may expire earlier upon N/A days notice by Lessor to its landlord(s).

24(b) Key Management Person designated for Lessee if Lessee is a Business Entity or Joint Lessee: _____.

NOTE TO LESSEE: BE SURE TO READ AND UNDERSTAND ALL OF THE PROVISIONS OF PART I AND PART II OF THIS LEASE BEFORE YOU SIGN BELOW.

Executed on the date shown below.

	Equiva Services LLC On Behalf Of
SID PRASHAD II Retailer	Motiva Enterprises LLC Seller
By: /s/ S. Prashad	By: /s/ Linda Paul Linda Paul
Title: Dealer	Title: Supervisor Contracts
Date: 07/13/00	Date: 07-24-00

PART II

1. DEFINITIONS. As used in this Lease, the terms below have the following meanings, whether singular or plural:

(a) "Alteration" – Any addition, modification, removal, or replacement (except as expressly provided in this Lease) of any building, improvement, or equipment on the Premises.

(b) "Business Entity" – Any legal entity that is not an individual or sole proprietorship, including, without limitation, a partnership, corporation, limited liability company, limited liability partnership, or association.

(c) "Law" – Any applicable statute, constitution, ordinance, regulation, rule, administrative order or other requirement of any federal, state, or local government agency or authority in effect at the time of execution or during the term of this Lease.

(d) "PMPA" – The Petroleum Marketing Practices Act as may be amended from time to time (15 U.S.C. § 2801 *et seq.*).

(e) "Premises" – The land owned or leased by Lessor at the location identified in PART I together with the buildings, improvements, and equipment existing as of the Effective Date of this Lease and located thereon after the Effective Date with Lessor's prior written consent, subject to Lessor's rights under Article 2.

(f) "RSA" – The Retail Sales Agreement entered into between the parties contemporaneously with this Lease.

2. LEASED PREMISES AND USE.

(a) Lessor leases the Premises to Lessee under the terms of this Lease. Lessee shall use the Premises

solely for the operation of a motor fuel dispensing station or, if approved by Lessor, an automobile service station, for the uses authorized by Lessor under the RSA. Lessee must obtain Lessor's prior written consent to use the Premises for any use not authorized under this article. If Lessor consents to Lessee's additional use, Lessor reserves the right to a portion of the fees, income or other revenue generated by such use.

(b) Lessor reserves the right to make use of the Premises so long as any such use does not materially interfere with the authorized use of the Premises then being made by Lessee. Without limiting the generality of the foregoing, Lessor's use of the Premises may include (1) the erection of additional buildings or Alterations of the Premises, in accordance with Article 9, to operate a car wash, convenience store, fast food facility, laundry, or any other business or (2) the installation of pay telephones, Automated Teller Machines, and other financial services, advertising signs and outdoor billboards, wireless radio signal devices and related equipment and facilities, video display terminals, computers, vending and other similar equipment. Lessor reserves the right to any fees, income, rentals or other revenue generated by such use or associated facilities.

(c) This Lease is subject to all covenants and restrictions contained in any deed or lease conveying or leasing the Premises to Lessor and all other deed restrictions, zoning laws, easements or encumbrances affecting the Premises, now or after the Effective Date of this Lease. Lessor reserves the right to grant a mortgage or security interest in the fee and leasehold interests affecting the Premises. This Lease is also subject and subordinate to any mortgage affecting the Premises now or after the Effective Date of this Lease provided the mort-

gage contains a "non-disturbance" clause requiring that the mortgagee not disturb the possession of Lessee, its successors, and assigns as long as they are not in default under this Lease. Upon Lessor's request, Lessee shall promptly execute and deliver to Lessor any instrument required by a mortgagee relating to Lessee's subordination of its rights under this Lease. Lessor also reserves the right to grant easements, rights-of-way, and licenses affecting the Premises.

(d) Lessee may not use the underground storage tank ("UST") system, including the associated product lines or motor fuel dispensing equipment provided by Lessor under this Lease to sell motor fuels not bearing a brand licensed to Lessee under the RSA without the prior written consent of Lessor, which consent may be withheld consistent with applicable Law. Lessee's installation and use of any additional tanks and associated equipment for the purpose of selling other motor fuel is subject to Article 9, all other applicable provisions of this Lease, and any related agreements between the parties.

3. **TERM.** The term of this Lease is identified in PART I but is subject to Lessor's termination and nonrenewal rights under Article 19. Neither party has any obligation to renew this Lease, or any extension of this Lease agreed to in writing by the parties, or continue the relationship established hereunder beyond the term provided in this except if required by Law. If by operation or effect of Law Lessor is required to continue its relationship established under this Lease with Lessee beyond the term specified in this article and the parties do not extend or renew this Lease by written instrument, then the term of this Lease will be extended on a month-to-month basis on the same terms and conditions of this Lease for not more than 6 successive months, subject to

(a) termination of this Lease by either party during such extension period in accordance with the notice provisions of Article 26 or (b) nonrenewal by Lessor at the end of any such month.

4. RENT.

(a) Lessee shall pay Lessor as monthly rent, without deduction, set off, notice, or demand (1) the base rent set forth in PART I together with (2) the double net expenses set forth in Exhibit A. Lessor may adjust the double net expenses at the end of each 12 month period during the term of this Lease to reflect any changes in these expenses (whether increases or decreases in the amounts) based on the applicable expenses for the previous period(s). If Lessor makes such an adjustment, Lessor shall provide Lessee written notification of the same. In addition, if during the term of this Lease Lessor makes an Alteration (whether a single Alteration or several Alterations as part of a single project) to the Premises of $100,000 or more (which amount may be amended by Lessor from time to time upon written notice to Lessee), upon completion of the Alteration and notification to Lessee, Lessee's rent will be adjusted by Lessor in a manner to reflect Lessor's additional investment in the Premises as reasonably determined by Lessor.

(b) Lessee shall pay Lessor the rent not later than the first day of each month, except that rent due on a weekend or federal holiday is payable on the business day following the due date. Rent for any period less than a calendar month will be prorated.

(c) Lessee shall pay the rent in accordance with Lessor's payment terms in effect from time to time. Lessor may require that Lessee pay the rent by electronic funds transfer initiated by Lessor or by any other meth-

od that Lessor may designate from time to time, and Lessee shall provide any written authorizations required for such purpose. Lessee shall maintain sufficient funds to cover such payment. In addition to any other remedies available to Lessor for Lessee's failure to comply with this article: (1) Lessee shall pay to Lessor a reasonable administrative fee for each instance of payment that Lessee does not have sufficient funds to cover payment and all overdue sums will bear interest at the maximum lawful rate per annum from the date due until paid, (2) Lessor may setoff or equitably recoup against any amount then due Lessee, (3) Lessor may defer further deliveries of the Products sold to Lessee under the RSA until payment of all outstanding indebtedness is made, and (4) Lessor may terminate or non-renew Lessee as set forth in Article 19.

5. **LESSEE'S EFFORTS.** Lessee shall devote Lessee's reasonable efforts to preserve the value of the Premises for the authorized use as specified in Article 2 and the reputation of Lessor by serving effectively and efficiently the needs of the public and consumers. Lessee shall personally and actively manage the business conducted on the Premises to assure good faith compliance with the terms of this Lease.

6. **COMPLIANCE WITH LAWS.** Lessee shall comply with all Laws, licenses, and permits relating to the Premises or any use thereof, including, but not limited to, any special zoning or other governmental restrictions and any Laws pertaining to environmental protection, safety, and health matters.

7. **TAXES, FEES AND OTHER BUSINESS CHARGES.**

(a) Lessee shall pay: (1) all federal, state, and local taxes, excises, duties, and other assessments and

charges, now or hereafter levied, ("Taxes") of any kind and nature assessed by any governmental authority relating to the operation, occupancy, or use of the Premises or business conducted by Lessee thereon including, without limitation, those Taxes measured by income and (2) any other fees or business charges that relate to the Premises or business conducted thereon. Without limiting the generality of the foregoing, any of the Taxes, fees or business charges paid by Lessor that relate to the Premises or business conducted thereon by Lessee including, but not limited to, ad valorem, sales and use, and personal property Taxes on Lessor's property and equipment or any leased property and equipment located on the Premises will be passed on to Lessee as a double net expense.

(b) Unless Lessor elects to do so at Lessee's expense, Lessee shall obtain and maintain, at Lessee's expense and in Lessee's name unless directed by Lessor otherwise, all licenses, registrations, and permits necessary for the operation of Lessee's business on the Premises, including, but not limited to, licenses or fees to operate the UST system on the Premises.

(c) Lessee shall timely pay all utility expenses, including, but not limited to, those relating to water, sewer, gas, telephone, electricity, and power to operate the Premises. Lessee shall transfer, or request the transfer of, all meters and accounts to Lessee's name unless Lessor directs otherwise. Lessee shall pay all other operating expenses relating to the operation of the business on the Premises, including, but not limited to, those relating to waste disposal, pest control, landscape, and snow removal.

(d) If Lessor satisfies any of Lessee's obligations under this article, Lessee shall reimburse Lessor upon

demand for the costs incurred by Lessor in doing so without prejudice to any other rights or remedies available to Lessor under this Lease or at Law.

8. **MAINTENANCE.** As of the Effective Date of this Lease, Lessee acknowledges that the Premises are in good condition and repair. At Lessee's own expense, Lessee shall timely perform the maintenance obligations set forth in Exhibit B, as may be amended by Lessor from time to time upon written notice to Lessee. Lessee shall keep Lessee's own property in good condition and repair. Lessor shall perform all other maintenance to the Premises. Lessee shall pay Lessor an amount for maintenance which will be passed on to Lessee as a double net expense. Notwithstanding Lessor's maintenance obligations, Lessee has the primary obligation to keep the Premises safe for all persons. Accordingly, Lessee shall immediately notify Lessor if any portion of the Premises is in need of maintenance by Lessor and shall perform any necessary interim maintenance to keep the Premises in a safe condition until such time as Lessor is able to do so within a reasonable time after receipt of notice from Lessee. If Lessee fails to perform its maintenance obligations, Lessor may perform those maintenance obligations and will charge to Lessee, in addition to Lessee's maintenance expense described above, Lessor's actual cost in performing the same. If Lessee fails to provide Lessor with any required notice relating to the maintenance of the Premises, Lessee shall be solely responsible for any resulting injury or damage.

9. **ALTERATIONS.**

(a) **Lessor's Alterations.** Except to the extent limited by applicable Law, Lessor may, from time to time, make Alterations to the Premises. The Alteration work may include, without limitation, the modernization,

reconstruction, or remodeling of the buildings, improvements, or equipment on the Premises and may involve the complete demolishing and rebuilding of the same. Lessor shall exercise due diligence to complete the Alteration in an expeditious manner. If Lessee's business is substantially disrupted or changed as a result of the Alteration work, Lessor will not be liable to Lessee for any loss including loss of profit resulting from the conduct of the work or completion delay except that Lessor shall reduce or suspend the rent payable by Lessee during the Alteration work period.

(b) **Lessee's Alterations.** With the exception of Lessee's maintenance obligations identified in Article 8 and Exhibit B, Lessee may not make any Alteration to the Premises without Lessor's prior written consent. Any Alteration authorized by Lessor will be at Lessee's own expense, must be made in accordance with plans and specifications approved by Lessor and any agreement between the parties, and must be performed by a contractor approved by Lessor. Lessee shall, at Lessee's expense, maintain the Alteration in a good and safe condition. If Lessee fails to maintain the Alteration, Lessor may do so and charge Lessee its reasonable expenses. At Lessor's election, upon termination or nonrenewal of the franchise relationship, Transfer of the Lease (as defined in Article 17 below), or as otherwise agreed to by the parties, any Alteration made by Lessee will become a part of the Premises and the property of Lessor, without any cost to Lessor. In the alternative, upon written notice to Lessee, Lessor may require that Lessee, within 30 days after termination or nonrenewal of the franchise relationship, remove any Alteration and restore the Premises to the condition prior to making the Alteration.

10. RELEASE DETECTION AND INVENTORY CONTROL.

(a) To assure early detection of any release from the UST system on the Premises, Lessee shall use a method or combination of methods of release detection in accordance with Lessor's procedures, as may be amended by Lessor from time to time, and applicable Law. If Lessor amends these procedures, Lessor shall provide Lessee with written notice of the same. Lessee shall also maintain a methodical daily inventory control program for motor fuel, including daily reconciliation of inventory readings with sales records and delivery receipts in accordance with Lessor's procedures and applicable Law. Lessee shall provide Lessor with immediate notice by telephone (promptly confirmed in writing) of any suspected release, of any claim or threatened claim by any third party related to a release or alleged release, or of any newly discovered material fact relating to any matter previously reported pursuant to this article. Without limiting the generality of the foregoing, Lessee shall provide Lessor with notice by telephone (promptly confirmed in writing) of any inventory discrepancy for a single product (loss or gain) in excess of: (1) 300 gallons for a single day; (2) 150 gallons per day for 3 consecutive days; or (3) 1% of sales plus 130 gallons for any 30-day period. Lessor may, from time to time, require Lessee to provide Lessor periodic written certifications that Lessee has complied with the provisions of this article.

(b) Lessee shall comply with all recordkeeping requirements of Lessor and applicable Law. Lessee shall retain for at least 3 years from the date of each sale of the motor fuel to Lessee's customers, and make available for Lessor's inspection and audit at all reasonable times,

Lessee's records and procedures maintained in accordance with this article.

(c) If Lessee fails to perform in a proper and timely manner Lessee's obligations under this article, in addition to any other rights or remedies Lessor may have under this Lease or Law, Lessor may retain the services of a qualified independent third party to inspect and audit Lessee's performance as frequently as necessary, at Lessee's sole expense, until such deficiencies are cured.

11. SECURITY. Lessee shall be solely responsible for the security at the Premises and shall operate and maintain the Premises in a secure manner so that criminal activity is adequately deterred from occurring at the Premises and all persons are adequately protected from injury, harm, or loss. Any security measures and devices not existing on the Premises at the time of execution of this Lease, including, but not limited to, pass-through drawers, bullet resistant enclosures, mirrors, locks, alarm systems, [and] camera systems deemed necessary by Lessee to meet Lessee's obligations under this article must be purchased, installed, and maintained at Lessee's sole discretion and expense, subject to Article 9(b).

12. RIGHT OF ENTRY. Lessor, its agents, and representatives may enter the Premises at all reasonable times to inspect the Premises, perform any maintenance, make Alterations, and verify Lessee's compliance with this Lease.

13. EXCUSES FOR NONPERFORMANCE. Both parties will be excused from their obligations under this Lease (except for financial obligations) to the extent that performance is delayed or prevented by any of the following matters: circumstances reasonably beyond the parties' control; fire, explosion, flood, ice storm, snowstorm, or earthquake; delay or loss of transportation or

delivery equipment; mechanical breakdown; strikes or other labor trouble, plant shutdown, riots, or other civil disturbances; or voluntary or involuntary compliance with any Law or request of any governmental authority.

14. INDEMNITY.

(a) TO THE EXTENT PERMITTED BY LAW, LESSEE SHALL INDEMNIFY AND DEFEND LESSOR, ITS MEMBERS, SUBSIDIARIES, AFFILIATES AND JOINT VENTURE PARTNERS, AND THEIR RESPECTIVE DIRECTORS, OFFICERS, EMPLOYEES, AND AGENTS ("INDEMNIFIED PARTIES") AGAINST ALL CLAIMS, DEMANDS, CAUSES OF ACTION, SUITS, DAMAGES, JUDGMENTS, LIENS, PENALTIES, AND EXPENSES INCLUDING, WITHOUT LIMITATION, ATTORNEYS' FEES AND LITIGATION COSTS, WHETHER INCURRED FOR AN INDEMNIFIED PARTY'S PRIMARY DEFENSE OR FOR ENFORCEMENT OF ITS INDEMNIFICATION RIGHTS (COLLECTIVELY, "CLAIM"), INCLUDING, WITHOUT LIMITATION, ANY CLAIM FOR HARM, INJURY, OR DEATH TO ANY PERSON, OR DAMAGE TO PROPERTY OR TO THE ENVIRONMENT ARISING OUT OF OR IN CONNECTION WITH ANY OF THE FOLLOWING MATTERS:

(1) LESSEE'S PERFORMANCE OR NONPERFORMANCE UNDER THIS LEASE;

(2) ANY ACTION OR OMISSION OF LESSEE, LESSEE'S EMPLOYEES, AGENTS, CONTRACTORS, ASSIGNS OR THIRD PARTIES; AND

(3) THE OPERATION OF LESSEE'S BUSINESS.

LESSEE'S OBLIGATION TO INDEMNIFY AND DEFEND EXTENDS TO ANY CLAIM CAUSED BY THE CONCURRENT OR CONTRIBUTORY NEGLIGENCE OR FAULT OF AN INDEMNIFIED PARTY BUT NOT TO ANY CLAIM SHOWN BY FINAL NONAPPEALABLE JUDGMENT TO HAVE BEEN CAUSED BY THE INDEMNIFIED PARTY'S SOLE NEGLIGENCE.

(b) WITHIN 24 HOURS AFTER THE OCCURRENCE OF WHICH MAY RESULT IN A CLAIM, LESSEE SHALL REPORT THE SAME TO LESSOR BY TELEPHONE AND SHALL PROMPTLY THEREAFTER CONFIRM THE SAME BY WRITTEN NOTICE, INCLUDING ALL CIRCUMSTANCES THEREOF KNOWN TO LESSEE OR LESSEE'S EMPLOYEES.

(c) PROMPTLY AFTER RECEIVING NOTICE, AT LESSEE'S EXPENSE, LESSEE SHALL INVESTIGATE, RESPOND TO, AND DEFEND ANY CLAIM ASSERTED AGAINST ANY INDEMNIFIED PARTY, INCLUDING, WITHOUT LIMITATION, ANY CLAIM ALLEGING THE INDEMNIFIED PARTY'S SOLE NEGLIGENCE. THE INDEMNIFIED PARTY MAY PARTICIPATE IN THE DEFENSE AND SETTLEMENT OF ANY CLAIM OR LITIGATION WITH ATTORNEYS OF THE INDEMNIFIED PARTY'S SELECTION WITHOUT RELIEVING LESSEE OF ANY OBLIGATIONS UNDER THIS ARTICLE. LESSOR SHALL REIMBURSE LESSEE FOR THE AMOUNT OF ANY JUDGMENT AND REASONABLE DEFENSE COSTS PAID BY LESSEE WHICH REPRESENTS THE TOTAL LIABILITY FOUND BY FINAL NONAPPEALABLE

JUDGMENT TO HAVE BEEN CAUSED BY THE INDEMNIFIED PARTY'S SOLE NEGLIGENCE.

(d) THE INSURANCE REQUIREMENTS OF ARTICLE 15 DO NOT LIMIT OR RESTRICT IN ANY WAY LESSEE'S OBLIGATIONS UNDER THIS ARTICLE.

(e) LESSEE'S OBLIGATIONS UNDER THIS ARTICLE SURVIVE TERMINATION OR NONRENEWAL OF THIS LEASE.

15. INSURANCE.

(a) Lessee shall maintain, at its sole cost, at all times during the term of this Lease, the following insurance coverage with providers satisfactory to Lessor with limits not less than those limits below (the "Insurance"):

(1) Garage Insurance with limits of $1,000,000 each occurrence and $1,000,000 general aggregate and Garagekeepers Legal Liability Insurance with a limit of $50,000 each occurrence, such policy to include endorsement GL 20 10 Broadened Coverage, with Fire Legal Liability limits of $300,000 each occurrence. Lessees owning or operating up to and including 3 locations are subject to the minimum limits above. Lessees owning or operating 4 up to and including 5 locations shall amend their Garage policy aggregate to $3,000,000. Lessees owning or operating 6 or more locations shall amend their Garage policy aggregate to $5,000,000. In lieu of amending aggregate limits as described in this article, endorsement CG 2504 or its equivalent amending aggregate limits per location may be utilized when applied to the above described minimum limits. Limits in excess of $1,000,000 may be provided by Excess or Umbrella Liability coverage. This Insurance is only required for those locations engaged in automotive repairs, and should be

used in lieu of Commercial General Liability insurance in Article 15(a)(2) below. As applicable, Lessee shall maintain the following:

(i) Liquor Liability Insurance if Lessee owns or operates the location and alcoholic beverages are sold at the location, utilizing endorsement CG 24 08 or its equivalent.

(ii) Marine Terminal or Wharfingers Liability Insurance if Lessee operates a marine facility. If Lessee supplies the marine facility via watercraft the watercraft exclusion must be deleted or equivalent coverage purchased.

(2) Commercial General Liability Insurance unamended or Comprehensive General Liability Insurance with Broad Form CGL endorsement with limits of $1,000,000 each occurrence and $1,000,000 general aggregate, with Fire Legal Liability limits of $300,000 each occurrence. Lessees owning or operating up to and including 3 locations are subject to the minimum limit above. Lessees owning or operating 4 up to and including 5 locations shall amend their policy aggregate to $3,000,000. Lessees owning or operating 6 or more locations shall amend their policy aggregate to $5,000,000. In lieu of amending aggregate limits as described in this article, endorsement CG 2504 amending aggregate limits per location may be utilized when applied to the above-described minimum limits. Limits in excess of $1,000,000 may be provided by Excess Liability or Umbrella Liability coverage. As applicable, Lessee shall maintain the following:

(i) Liquor Liability Insurance if Lessee owns or operates the location and alcoholic beverages are sold thereon, utilizing endorsement CG 24 08 or its equivalent.

(ii) Marine Terminal or Wharfingers Liability Insurance if Lessee operates a marine facility. If Lessee supplies the marine facility via watercraft the watercraft exclusion must be deleted or equivalent coverage purchased.

(3) Business Automobile Liability Insurance covering all vehicles used in the operations of the Lessee with limits of liability of: Bodily injury $1,000,000 each person, $1,000,000 each accident; Property damage $1,000,000; or a Combined Single Limit of $1,000,000 for bodily injury and property damage, such policy to be endorsed with MCS-90 when hazardous material transportation is involved.

(4) Workers' Compensation Insurance and Longshoremen's and Harborworkers' Compensation Insurance as required by Laws applicable to and covering employees of Lessee during the term of this Lease.

(5) Employers' Liability Insurance protecting Lessee against common law liability, in the absence of statutory liability, for employee bodily injury arising out of the master-servant relationship with a limit of $500,000 Each Accident, $500,000 Disease – Policy Limit; $500,000 Disease – Each Employee.

(b) Lessee shall assure that the Insurance policies: (1) provide a waiver of subrogation in favor of Lessor where permissible by Law, (2) allow for the separation of insureds, and (3) provide for written notice of cancellation or material change. Notice of cancellation or change will not affect the Insurance until 30 days after Lessor receives written notice. Any deductible or retention of insurable risks will be for the Lessee's account.

(c) Lessee shall assure that the Insurance required in this article and each certificate evidencing the

Insurance issued to Lessee names Lessor and its members, subsidiaries, affiliates and joint venture partners, to the extent of their interest, and, where applicable, Lessor's landlord and any mortgagee, as additional insureds (Article 15(a)(1) and (2) as applicable), without regard to the allocation of liability provisions contained in this Lease, to the extent of any claim, loss or liability within the scope of the required Insurance. The parties intend that, to the extent of their interest, the status of Lessor and its members, subsidiaries, affiliates and joint venture partners as additional insureds will not be limited. Lessee shall secure from its insurance companies and provide to Lessor, for all required Insurance (Article 15(a)(1) and (2) as applicable), an additional insured endorsement with terms equivalent to ISO Form CG 20 26 11 85.

(d) Within 30 days after the execution of this Lease and during the term of this Lease as necessary, Lessee shall provide Lessor with a certificate of Insurance evidencing Lessee's compliance with Lessor's Insurance requirements. Lessee's failure to provide certificates evidencing the requirements or purchase Insurance coverage in compliance with this article will not relieve Lessee of its obligations in this article.

16. CASUALTY LOSS AND DAMAGE.

(a) Lessee shall comply with Lessor's Casualty Loss standards and procedures as may be amended by Lessor from time to time. If Lessor amends the standards and procedures, Lessor shall provide Lessee with written notice. For the purpose of this article, "Casualty Loss" means any repair or replacement that needs to be made to the Premises as the result of damage or vandalism caused by: (1) any act or omission of any third party, including, without limitation, Lessee's customers, vendors, and contractors, or (2) an act of God.

(b) Lessee is responsible for all damage to the Premises caused by Lessee's acts or omissions and shall make any repairs or replacements necessary, at Lessee's sole expense, as a result of such acts or omissions. If Lessee fails to make the repair or replacement, Lessor may do so and will charge Lessee for the same, which will be in addition to Lessee's maintenance expense as described in Article 8.

(c) Lessee shall reimburse Lessor for unrecovered Casualty Loss up to a maximum of the first $5000 (including taxes and the costs of collection) per incident. Lessor shall use its reasonable efforts to recover damages caused by Casualty Loss and Lessee shall cooperate with Lessor in doing so.

17. LIMITATION OF LIABILITY. Neither party is liable to the other party for any indirect, special, incidental, consequential, or punitive damages arising under this Lease whether under tort, contract, strict liability, warranty, statute, or otherwise.

18. ASSIGNMENTS, ENCUMBRANCES, AND RIGHT OF FIRST REFUSAL.

(a) **Assignment by Lessee.** This Lease is personal to Lessee. If Lessor elects not to exercise Lessor's right of first refusal as set forth below, Lessee may sell, transfer, encumber, or assign its interest under this Lease, in whole or in part, sublease any portion of the Premises, or permit any other person to occupy or use all or any part of the Premises, whether voluntarily, involuntarily, or by operation of Law (collectively, "Transfer") with the prior written consent of Lessor, which consent may be withheld consistent with applicable Law. Notwithstanding the foregoing, Lessee may only Transfer its interest under this Lease as it pertains to the operation of a motor fuel dispensing station or automobile service

station, as the case may be, and any facilities for uses otherwise authorized under the RSA revert back to Lessor, at Lessor's sole discretion. Lessor's consent to Transfer may be conditioned upon, but not limited to, the (1) proposed transferee satisfying all of Lessor's then current requirements for the qualification of new lessees; (2) Lessee satisfying all indebtedness owed by Lessee to Lessor; and (3) proposed transferee agreeing to be bound by all the terms and conditions of this Lease. Lessor will have 60 days (or any lesser period specified by Law), after receipt of Lessee's request for Lessor's consent to Transfer and all qualification information reasonably required by Lessor, to provide Lessee with written notice of its decision to grant or withhold consent. Lessor's consent to any Transfer is not a waiver of the provisions of this article as to any future transaction. Any Transfer by Lessee without Lessor's prior written consent is void.

(b) **Trial Franchise.** Except to the extent limited by applicable Law, if Lessee desires to Transfer its interest in this Lease to an individual or Business Entity that has not previously operated as a retailer of petroleum products of Lessor or Lessor's affiliates, then Lessee may be required to execute a mutual termination of this Lease and the proposed transferee may be required to execute a trial franchise agreement as a condition to Lessor granting its consent to the Transfer.

(c) **Transfer Events.** Without limiting the generality of the foregoing, the following events constitute a Transfer:

(1) Lessee dies and Lessee's interest in this Lease is transferred, whether by will or operation of Law;

(2) Lessee becomes bankrupt or insolvent, Lessee makes an assignment for the benefit of creditors,

or a proceeding is instituted under the Bankruptcy Code and, if it is an involuntary proceeding, Lessee or other affected party has not had it dismissed within 60 days;

(3) A writ of attachment or execution is levied on this Lease and not removed by Lessee within 30 days;

(4) A receiver is appointed with authority to take possession of the Premises and is not removed within 60 days in any proceeding or action to which Lessee is a party;

(5) If Lessee is a limited liability partnership or partnership, a withdrawal or any change of interest (voluntary, involuntary, or by operation of Law) of any partner or the dissolution of the partnership;

(6) If Lessee is a limited liability company or a corporation, any dissolution, merger, consolidation or other reorganization, or other arrangement having similar effect, or the sale or transfer by Lessee or any member or shareholder of 10% or more of the voting shares of the capital stock of Lessee or of any lesser interest which cumulatively vests 10% or more of such voting shares in the transferee; and

(7) If Lessee is comprised of more than one person, any change of interest (voluntary, involuntary or by operation of Law) of any such person.

(d) **Right of First Refusal**. If Lessee receives a bona fide offer from a third party to purchase Lessee's interest in this Lease, Lessee may not Transfer any of Lessee's interest in this Lease without first offering, in writing, to Transfer the same to Lessor or its designee on terms and conditions which are the same as those of the proposed Transfer to a third party. Lessor will have 30 days after receipt of the offer and of a complete and exact copy of the third party offer to accept or reject the offer.

If Lessor rejects the offer and consents to the Transfer as set forth in Article 18(a), Lessee may make the proposed Transfer to the third party, but not at a lower price or on more favorable terms than those offered to Lessor. If such Transfer is not consummated within 4 months from the expiration of the 30-day period, Lessee shall re-offer the interest to Lessor in accordance with the foregoing provisions.

(e) Transfer Fee.

(1) Except for lessees in New Hampshire or Virginia which will be governed by applicable state Law, to the maximum extent permitted by Law, Lessee shall pay to Lessor a franchise transfer fee ("Transfer Fee") in the form of a bank cashiers check prior to or at the closing of any Transfer. With the exception of a Transfer in the event of Lessee's death, long term disability, or sickness (6 months or more) that prevents Lessee from operating the business at the Premises, the Transfer Fee is applicable to all Transfers, including a Transfer to the Lessor. If Lessee Transfers any stock, the Transfer Fee will be prorated based on the number of shares transferred.

(2) For purposes of calculating the Transfer Fee as set forth below, the "Gross Sales Price" is the value of any consideration received excluding the value of the inventory and equipment. At the time of closing, the transferee and Lessee shall execute an Affidavit of Consideration certifying the Gross Sales Price and assigning values to the equipment and inventory based on the last invoice from Lessor for the motor fuel and retail cost for the other inventory. If Lessor, in the exercise of reasonable judgment, disagrees with the equipment values, Lessor may require that the transferee obtain an appraisal of the equipment. Lessor shall provide the trans-

feree with the names of 3 Member Appraisal Institute (M.A.I.) appraisers. If the appraised value on the equipment is greater than or equal to the assigned value by the transferee, Lessor shall pay for the appraisal. If the appraised value of the equipment is less than the assigned value, the transferee shall pay for the appraisal. The appraisal will be conclusive for establishing the value of the equipment.

(3) With the exception of a Transfer by Lessee's Designee as defined in the RSA, the amount of the Transfer Fee will be the greater of $6500 or the amount arrived at by multiplying the difference between the baseline Gross Sales Price (the price Lessee paid for the business originally) and the Gross Sales Price for the current Transfer by the applicable percentage below (which is based upon the year Lessee makes the Transfer).

(i) Less than 3 years at 35%

(ii) 3 years to less than 6 years at 20%

(iii) 6 years to less than 9 years at 15%

(iv) 9 years or more at 0%

For any Transfer by Lessee's Designee, the Transfer Fee will be $6500.

(f) **No Liens**. Except to the extent permitted under this article, Lessee shall keep the Premises and Lessee's interest in this Lease free and clear of all liens, claims, or other encumbrances. Lessee shall discharge any mechanic's, laborer's, or materialman's lien on account of labor, materials, or services performed or supplied to Lessee, or any security agreement, conditional bill of sale, chattel mortgage, or other agreement on account of personal property furnished or leased to Lessee. Lessee shall reimburse Lessor for any costs and ex-

penses, including attorneys' fees and costs, which are incurred as a result of the violation of the provisions of this article.

(g) **Assignment by Lessor**. Lessor may Transfer its interest, in whole or in part, in this Lease or in the Premises.

19. TERMINATION OR NONRENEWAL.

(a) **Termination by Lessor**. Subject to any limitations imposed by Law, and in addition to all other rights or remedies available, Lessor may terminate this Lease for any of the following grounds.

(1) Lessee's failure to comply with any provision of this Lease, which provision is both reasonable and of material significance to the relationship under this Lease;

(2) Lessee's failure to exert good faith efforts to carry out the provisions of this Lease;

(3) The occurrence of an event which is relevant to the relationship under this Lease and as a result of which termination of this Lease is reasonable, including, without limitation, the following events:

(i) Lessee's fraud or criminal misconduct relevant to the operation of the Premises;

(ii) Lessee's declaration of bankruptcy or judicial determination of insolvency;

(iii) Lessee's continuing severe physical or mental disability if Lessee is an individual, or if Lessee is a partnership or corporation, the disability of any individual who is currently in "control" of the ownership interest of Lessee ("control" being the authority to direct the operations of Lessee and to have or exercise management responsibility), of at least 3 months' duration

that renders Lessee unable to provide for the continued proper operation of the Premises;

(iv) Loss of Lessor's right to grant possession of the Premises through expiration of an underlying lease;

(v) Condemnation or other taking, in whole or in part, of the Premises pursuant to the power of eminent domain;

(vi) Destruction (other than by Lessor) of all or a substantial part of the Premises;

(vii) Lessee's failure to pay Lessor in a timely manner when due rent and all other sums to which Lessor is legally entitled, including, without limitation, any sums due Lessor under the RSA;

(viii) Lessee's failure to operate the Premises for 7 consecutive days, or such lesser period which under the facts and circumstances constitutes an unreasonable period of time;

(ix) Lessee's willful adulteration, mislabeling, or misbranding of motor fuels or other trademark violations;

(x) Lessee's knowing failure to comply with the Laws relevant to the operation of the Premises;

(xi) Lessee's conviction of any felony involving moral turpitude;

(xii) Lessee's death if Lessee is an individual, or if Lessee is a partnership or corporation, the death of any individual who is currently in "control" of the ownership interest of Lessee ("control" being the authority to direct the operations of Lessee and to have or exercise management responsibility); and

(xiii) Lessee's failure to comply with the Insurance requirements under Article 15.

(4) A determination is made by Lessor in good faith and in the normal course of business to withdraw from marketing of motor fuel through retail outlets in the relevant geographic market area in which the Premises are located;

(5) Termination of the RSA; or

(6) Any other ground for which termination is provided for in this Lease or is otherwise allowed by the PMPA or other applicable Law.

(b) **Termination Prior to Effective Date**. If after execution but prior to the Effective Date of this Lease Lessor has grounds to terminate or not renew any then existing Retail Facility Lease between the parties, or to terminate this Lease as if it were then in its term, Lessor may terminate this Lease, as well as any existing Retail Facility Lease, based on those grounds.

(c) **Nonrenewal by Lessor**. Subject to any limitations imposed by Law, and in addition to all other rights or remedies available, Lessor may not renew this Lease for any of the following grounds.

(1) Any of the grounds specified in Article 19(a);

(2) Nonrenewal of the RSA; or

(3) Any other ground for which nonrenewal is provided for in this Lease or is otherwise allowed by the PMPA or other applicable Law.

(d) **Termination for Changed Laws**. Lessor may terminate this Lease, upon notice to Lessee, if any Law operates to prevent the continued use or occupancy of the Premises (either directly or by requiring an Al-

teration at a cost which is disproportionate to the value of the Premises for the continued use or occupancy) for the purpose for which the Premises were being used immediately prior to the effective date, application, or enforcement of the Law, as the case may be.

(e) **Mutual Termination.** The parties may terminate or not renew this Lease by mutual written agreement in the form and manner permitted by the PMPA.

(f) **Repudiation of Prior Lessee's Mutual Termination.** Lessor and Lessee may have executed this Lease prior to the actual Effective Date of this Lease to provide Lessee early possession of the Premises. In consideration thereof, Lessee acknowledges that Lessor may terminate this Lease immediately upon notice to Lessee if the existing (or prior) lessee at the Premises repudiates the mutual termination agreement executed by that lessee and Lessor within the period provided under the PMPA.

20. RIGHTS AND DUTIES UPON TERMINATION OR NONRENEWAL.

(a) Upon termination or nonrenewal of this Lease, Lessee shall peaceably surrender the Premises to Lessor. The Premises must be surrendered to Lessor in as good condition as when received, ordinary wear and tear excepted. If necessary, Lessor may re-enter and repossess the Premises without affecting any other rights or remedies available to Lessor under this Lease or otherwise.

(b) If Lessee fails to remove any of Lessee's property upon termination or nonrenewal of this Lease, or any Lessee Alteration Lessor requests Lessee to remove within 30 days after termination or nonrenewal of this Lease, Lessor may: (1) sell all or any part of the same for

Lessee's account on such terms as Lessor may desire and apply the proceeds of the sale, after reimbursing itself for the costs thereof; to the payment of any indebtedness of Lessee and (2) purchase any or all such personal property on such reasonable terms as Lessor may desire. If Lessee fails to restore the Premises after removal of Lessee's property or Alteration, Lessor may restore the Premises and charge Lessee for the expenses involved in doing so.

(c) In addition to Lessor's rights under Article 20(b), Lessor will be entitled to compensation, as liquidated damages and not as a penalty, in the amount of $300.00 per day from Lessee from the date of termination or nonrenewal of this Lease until the date of final removal of Lessee's property and restoration of the Premises by Lessor or Lessee, as the case may be.

21. UNDERLYING LEASE. If indicated in PART I that Lessor does not own the Premises the following provisions apply.

(a) Lessee acknowledges that Lessor does not own the land or improvements covered by this Lease but leases the land from a third party under an underlying lease that will expire on the date set forth in PART I. Lessee is also notified that, upon expiration, Lessor's underlying lease may not be extended or renewed on that date, with the result that this Lease may be terminated prior to, or not renewed at, the end of the term. If Lessor's underlying lease is extended or renewed beyond the date stated in PART I, then this Lease will continue in effect or be renewed, as the case may be, provided other grounds for termination or nonrenewal do not then exist.

(b) This Lease is subject to all conditions and restrictions affecting the underlying lease under which Lessor is now or hereafter entitled to possession. Lessee

shall not commit or permit any act or omission that would impair or jeopardize Lessor's interest under the underlying lease.

22. CONDEMNATION. If all or any part of the Premises is condemned for public or quasi-public use, or if Lessor agrees to execute a voluntary conveyance in lieu of condemnation, either party may terminate this Lease by giving the other prior notice. Lessor, not Lessee by virtue of this Lease, will be entitled to any condemnation award or payment in exchange for a voluntary conveyance, and Lessee assigns to Lessor all of Lessee's right to or interest in any award or settlement subject to any applicable requirements of the PMPA. Nothing in this Lease, however, precludes Lessee from pursuing a claim Lessee may have directly against the condemning authority under applicable Law to receive compensation for business relocation expense or for loss of business opportunity or good will. If this Lease is not terminated because less than all of the Premises is condemned, the condemnation will not affect the obligation of Lessee to pay the full rental and to perform all of Lessee's obligations under this Lease.

23. INDEPENDENT CONTRACTOR. Lessee is an independent contractor and Lessor has no right to exercise control or direction over any aspect of the Lessee's business or the operations conducted on the Premises. No provision in this Lease is intended to interfere with or diminish Lessee's complete control over and sole responsibility for the health, safety, and security matters at the Premises. This Lease does not establish any partnership, joint venture, employment, or agency between the parties or Lessee's employees or agents.

24. BUSINESS ENTITY OR JOINT LESSEE.

(a) If Lessee is comprised of more than one person, the obligations imposed under this Lease are joint and several as to each person and all of the terms apply to each person with the same effect as though that person were the sole Lessee.

(b) If Lessee is a Business Entity, all obligations under this Lease of a personal nature apply as if the Business Entity were an individual and, insofar as is legally possible and reasonably practicable, to those individuals who have or exercise management responsibility for the Business Entity, including, but not limited to, officers, directors or agents of corporations and partners of partnerships. The Business Entity must manage its affairs with respect to the personal obligations in a manner so as to give full force and effect to the same. Subject to Lessor's prior written approval, Lessee shall designate a Key Management Person as identified in PART I. Lessee may change Lessee's Key Management Person upon Lessor's prior written approval. If Lessee's Key Management Person exercises primary management responsibility for Lessee's day-to-day operations, Lessor may look to the Key Management Person in connection with the performance of the personal obligations.

25. ACTS ATTRIBUTABLE TO LESSEE. The acts or omissions of Lessee's employees and agents are the acts or omissions of Lessee. If Lessee is comprised of more than one person the acts or omissions of each such person are the acts or omissions of Lessee. If Lessee is a Business Entity, in addition to those persons mentioned above, the acts or omissions of the Key Management Person designated in PART I and of each partner, shareholder or member, as the case may be, will be considered the acts or omissions of Lessee.

26. NOTICES.

(a) Except as otherwise specified in this Lease, all notices must be in writing and in compliance with the PMPA and other applicable Law. Subject to any requirements of Law, any notice may be given to Lessee by personal service or to either party by certified mail, regular mail, telegram, facsimile, mailgram, or overnight or local courier. Notice will be deemed given when: (1) deposited in the U.S. Mail, postage or charges pre-paid and directed to the party for whom intended at the address in this Lease or such other address as directed by the party upon written notice to the other if given by certified mail or regular mail; (2) deposited with the dispatching agency, postage or charges pre-paid and directed to the party for whom intended at the address in this Lease or such other address as directed by the party upon written notice to the other if given by telegram, mailgram or overnight or local courier; or (3) confirmation is received by the sending party if given by facsimile.

(b) If Lessee is a Business Entity, Lessor may give notice to: (1) the Key Management Person; (2) any officer or director of a corporation or limited liability company; (3) any partner of a partnership or limited liability partnership; or (4) any personal representative, agent, or employee of any other Business Entity.

27. ALTERNATIVE DISPUTE RESOLUTION. Except for an action brought by Lessor to enforce a termination or nonrenewal of this Lease or to collect indebtedness, if a dispute arises between the parties concerning their respective rights under this Lease, and where commercially reasonable and practicable, the parties shall seek to resolve the dispute by using an appropriate form of alternative dispute resolution prior to initiating litigation proceedings. If the parties are unable to

reach resolution within 60 days following notice of a written claim, either party may initiate litigation proceedings. Except for an action brought by Lessor to collect indebtedness, neither party, however, may institute court proceedings against the other more than one year after the incident giving rise to the claim.

28. RELEASE.

THE PARTIES RELEASE EACH OTHER, THEIR RESPECTIVE MEMBERS, SUBSIDIARIES, AFFILIATES AND JOINT VENTURE PARTNERS, AND THEIR RESPECTIVE DIRECTORS, OFFICERS, EMPLOYEES, AND AGENTS AS OF THE EFFECTIVE DATE OF THIS LEASE AND TO THE EXTENT PERMITTED BY LAW, FROM ALL CLAIMS WHICH EACH PARTY MAY HAVE AGAINST THE OTHER (WHETHER OR NOT NOW KNOWN), ARISING DIRECTLY OR INDIRECTLY OUT OF OR IN CONNECTION WITH ANY PRIOR LEASE, EXCEPTING, HOWEVER, CLAIMS OF LESSOR AGAINST LESSEE FOR INDEBTEDNESS, REIMBURSEMENT, OR INDEMNIFICATION. LESSEE UNDERSTANDS THAT THIS RELEASE WAIVES ANY LIMITATION WITH REGARD TO A GENERAL RELEASE THAT MAY EXIST UNDER APPLICABLE LAW AND THAT EVEN IF LESSEE OR LESSOR SHOULD LATER BECOME AWARE OF A CLAIM ARISING OUT OF EVENTS OR CIRCUMSTANCES NOT NOW KNOWN OR SUSPECTED TO EXIST, LESSEE OR LESSOR, AS THE CASE MAY BE WILL NOT BE ABLE TO ASSERT SUCH CLAIM AGAINST THE OTHER.

29. ATTORNEY'S FEES. Lessor will be entitled to recover from Lessee reasonable attorney's fees and other

legal costs Lessor incurs in order to secure or protect the rights inuring to Lessor under this Lease, or to enforce [*sic*]

30. GENERAL PROVISIONS.

(a) This Lease as of the Effective Date hereof cancels and supersedes all prior and contemporaneous representations, inducements, agreements, commitments, and undertakings with respect to the subject matter of this Lease, except those written agreements relating to any indemnification, reimbursement, indebtedness, or debt security obligations (including, but not limited to, any security interest, security agreement, guaranty, mortgage, deed of trust, promissory note, or UCC filing).

(b) Except as expressly provided under this Lease, this Lease may be amended or supplemented only in a writing signed by both parties.

(c) Any waiver of any provision of this Lease must be in writing signed by the parties. Delay or failure by either party of its right to enforce any provision of this Lease, and course of dealing, or trade custom or usage will not operate as a waiver of compliance with that provision or a waiver or estoppel of the party's right to enforce any other provision of this Lease.

(d) The provisions of this Lease are severable. If any provision of this Lease is, for any reason, invalid or unenforceable, the remaining provisions of this Lease are valid and enforceable if the basic intent of the parties is still capable of being achieved.

(e) This Lease is binding upon and enforceable against the parties' respective successors, permitted assignees, legal representatives, executors, administrators, heirs, and legatees.

(f) Neither this Lease nor any subsequent agreement amending or supplementing this Lease is binding on Lessor unless a duly authorized representative of Lessor [*sic*] the Lease, amendment, or supplement.

Exhibit A

Double Net Monthly Rental Expenses

Maintenance	Months 1-12:	$1,050.00
	Months 13-24:	$1,082.00
	Months 25-36:	$1,114.00

Ad valorem Taxes: $1,005.00 plus those other Taxes, fees, and business charges described in Article 7.

Exhibit B
Lessee's Maintenance Obligations

A. Yard

1. Maintain, including replacement as necessary, all landscaping as necessary to retain a healthy and attractive appearance. Items include, but are not limited to, all live and artificial plantings (shrubs, grass, flowers, trees, etc.), decorative rock, mulch and bark.

2. Repair or replace, as necessary, the entire yard sprinkler system, including, but not limited to, timers, backflow preventers (see Plumbing section), heads, piping, and rain sensors. Lessee shall drain system as necessary to prevent from freezing.

3. Regularly remove weeds, leaves, debris and litter from the Premises (including adjacent sidewalks, driveways and easements).

4. Remove snow and ice from the Premises (including adjacent sidewalks, driveways and easements).

B. Lighting – Interior

Repair or replace, as necessary, all lamps and bulbs, neons, transformers, ballasts, ballast wiring, starters, reflectors, lenses, grilles and sockets in the interior of all buildings.

C. Plumbing

1. Clear clogged toilets, sinks, building lube bay drains and on-property sewer lines. Clean oil separators and catch basins.

2. Repair or replace, as necessary, all flush mechanisms and faucets (excluding those in public restrooms).

3. Drain water lines to prevent freezing.

4. Empty septic tanks, water reclaim tanks for car-wash and cesspools as necessary. Empty and clean yard catch basins as necessary.

5. Repair or replace, as necessary, all hose bibbs.

6. Repair or replace, as necessary, all backflow preventers. Pay for and have performed periodic testing of backflow preventers as required by regulating authority.

7. Repair or replace, as necessary, water wells and pumps. Excludes drilling of a new water well.

8. Repair or replace, as necessary, all water heaters.

D. Heating/Air Conditioning

1. Repair or replace, as necessary, all components of heating and air conditioning system including, but not limited to, filters, controls, condensers, compressors, and wiring. Excludes total system replacement except for window/wall units. Provide seasonal preventive maintenance as required, but at least annually. System types include, but are not be limited to, forced air, hot water, steam, radiant, car wash entrance/exit mat or window/wall units.

2. Repair or replace, as necessary, all components of swamp coolers, including total system replacement.

E. Glasswork

Repair or replace, as necessary, all window and door glass, whenever scratched, cracked or broken from whatever cause. Includes bullet-resistant glass or plastic.

F. Floors

Restore floors to original condition upon removal of equipment installed by or at request of Lessee, subject to normal wear and tear.

G. Painting

During the interval between periodic general repainting by Lessor, wash and paint all curbs, yard and building equipment, lifts, interior/exterior walls, doors, ceilings and shelving as necessary. Lessor shall furnish paint that meets Lessor's specifications.

H. Tanks

1. Check underground motor fuel storage tanks daily for water in accordance with Lessor's procedures.

2. Empty waste oil tank as necessary using legally acceptable method of disposal.

3. Pump out and dispose of water in waste oil or heating oil tank as required using legally acceptable method of disposal.

4. Keep fills and access boxes clear of ice, snow, water and debris.

I. Pumps/Dispensers

1. Lubricate any motor fuel suction pumps in use (where motor and pump are contained in dispenser housing). Lubricate suction pump weekly or per manufacturer's recommendations.

2. Repair or replace, as necessary, all hanging hardware for fuel pumps or dispensers. Hanging hardware includes, but is not limited to, whip hoses, breakaways, flow restrictors in the hose assembly, hoses, nozzles, nozzle spouts, swivels, splash guards, clamps, or scuff guards, including any associated with a vapor recovery system. Lessee's Maintenance obligations under this provision requires Lessee to immediately replace any hanging hardware that causes the fueling system to fail regulatory compliance testing. Check daily for visible leaks.

J. Air Compressor

Repair or replace, as necessary, all components of air compressors for service bay, car wash bay/building or remote air stand including all add-on equipment such as filters, air dryers, separators, regulators, above ground piping, excluding total compressor replacement.

K. C-Store/Food Mart and Related Equipment (if located on Premises)

1. Repair or replace, as necessary, all components of cooler/freezer and refrigeration units (walk-in and free-standing), excluding total system replacement. Provide preventive maintenance as required, but at least annually.

2. Repair or replace, as necessary[,] all food accessories, including, but not limited to coffee makers, juice and soda dispensers, ice dispensers, microwaves, gondolas and all other C-store/food mart related equipment, including lamps, ballasts, fuses and glass therein.

3. Keep all food handling equipment and food preparation areas clean, sanitary and in compliance with applicable Laws.

4. Keep all equipment drain lines clean and clear.

L. Car Wash (if located on Premises)

1. Repair or replace, as necessary, all elements of car wash equipment, including any optional or add-on equipment with control and connection hardware, including, but not limited to, brushes, dryers, wheel scrubbers, undercarriage washers, foamers, conveyors, entrance keypads, consoles, cash/coin/token acceptors, and all elements of any water reclaim system. Perform preventive maintenance per manufacturer[']s recommendations.

2. Repair or replace, as necessary, all elements of overhead doors or curtains and their controls including, but not limited to, motors, sensors, electric eyes, tracks, pneumatic actuators, pneumatic cylinders, chains, springs, and door edge sensors.

3. Car wash heating system (refer to Heating/Air Conditioning section).

4. Car wash air compressor (refer to Air Compressor section).

5. Car wash water reclaim tanks (refer to Plumbing section).

M. Fire Protection

1. Repair or replace, as necessary, dry chemical or liquid fire suppression/fire sprinkler equipment for fueling area and building including, but not limited to, sensors, bottles, heads, fuseable alarm/monitoring systems, cables, backflow preventers, above ground wiring, piping, and conduit. Replace and recharge system as necessary.

2. Furnish and maintain portable fire extinguishers.

3. Pay for and have performed period testing and inspection of fire suppression/fire sprinkler systems, and hand held extinguishers as required by regulating authority.

N. Other Equipment

1. Repair or replace, as necessary, all Lessee-owned equipment.

2. Repair or replace, as necessary, all elements of oil and lube equipment and used oil pumps, including, but not limited to, hoses, fittings, spouts, meters, pumps, above ground piping, and overhead reels.

3. Repair or replace, as necessary, all elements of interior and exterior video monitoring systems including

those required by regulating authorities such as self-serve dispenser monitoring. Maintenance responsibility includes, but is not limited to, cameras, monitors, recorders, switching devices, cables, wires, and above ground conduit. Pay for and have performed periodic testing and inspection as required by any regulating authority.

4. Repair or replace, as necessary, above ground and below ground safes.

5. Repair or replace, as necessary, pass through drawers.

O. Miscellaneous

1. Repair or replace, as necessary, all building locks and keys, latches for both interior and exterior doors and, in addition, door closers and hinges for interior doors.

2. Repair or replace, as necessary, all elements of overhead doors, excluding total door replacement.

3. Reset circuit breakers, replace electrical fuses.

4. Keep restrooms at all times neat, clean, safe and orderly, free of offensive odors and well stocked with proper supplies and cleaning materials.

5. Take all necessary pest control measures.

6. Repair or replace, as necessary, all bay and C-store/food mart cabinets and shelving including, but not limited to, doors, hinges, knobs, levers, cup dispensers, and condiment racks.

7. Maintain all paths of travel on the Premises free of obstruction and accessible in compliance with applicable accessibility law including but not limited to accessibility provisions of the Americans with Disabilities Act.

All repairs and replacements performed by the Lessee must meet or exceed the specifications of the existing

equipment (e.g. a 5-horsepower air compressor must be replaced with a 5-horsepower air compressor), of equal quality, as well as comply with Lessor's image standards, if applicable. If Lessee is unsure about a specific standard, Lessee should consult with Lessor.

MOTIVA
ENTERPRISES LLC

[Defendants' Exhibit 1166]

Retailer #: 524190
Cost Center #: 137850

RETAIL FACILITY LEASE

THIS LEASE is effective January 1, 2004 ("Effective Date") between Motiva Enterprises LLC ("Lessor") whose address is 12700 Northborough Drive, Houston, TX 77067, and AKMAL INC ("Lessee") whose address is 302 WEST BROADWAY, SOUTH BOSTON, MA 02127.

This Lease is comprised of two parts. PART I sets forth the variable provisions of this Lease and references the applicable articles in PART II that sets forth the general provisions. To the extent there is a conflict between PART I and PART II, the provisions in PART I are controlling.

PART I

Article No.

1(e) Leased Premises are located at 302 WEST BROADWAY, SOUTH BOSTON, MA 02127.

3 This Lease begins on the Effective Date specified above and expires December 31, 2006 ("Expiration Date").

4 Rent: Lessee shall pay Lessor the following monthly base rentals, PLUS THE DOUBLE NET EXPENSES WHICH MAY BE ADJUSTED AT THE END OF EACH 12-MONTH PERIOD AS DESCRIBED IN THIS ARTICLE AND IDENTIFIED ON EXHIBIT A:

Months 1 – 12:	$10,540.00
Months 13 – 24:	$10,793.00

Months 25 – 36: $11,074.00

20 Notice – Underlying lease. The Premises are subject to an underlying lease(s) that will expire on N/A, provided, however, the underlying lease may expire earlier upon N/A days notice by Lessor to its landlord(s).

23(b) Key Management Person designated for Lessee if Lessee is a Business Entity or Joint Lessee Akmal G. Moawed.

NOTE TO LESSEE: BE SURE TO READ AND UNDERSTAND ALL OF THE PROVISIONS OF PART I AND PART II OF THIS LEASE BEFORE YOU SIGN BELOW.

Executed on the date shown below.

	Shell Oil Products US On behalf of
AKMAL INC Retailer	Motiva Enterprises LLC Seller
By: /s/ A.G. Moawed	By: /s/ Allen Girndt Allen Girndt
Title: President, Akmal Inc.	Title: Manager Contracts
Date: 12-18-03	Date: 1/5/04

[Defendants' Exhibit 1175]

MOTIVA
ENTERPRISES LLC
Shell, Texaco & Saudi Aramco Working Together

Retailer #: 556418
Cost Center #: 137870

RETAIL FACILITY LEASE

THIS LEASE is entered into between Motiva Enterprises LLC ("Lessor") whose address is 12700 Northborough Drive, Houston, TX 77067, and J & M AVRAMIDIS ("Lessee") whose address is 920 MAIN STREET, WALPOLE, MA 02081 and is effective on the later of the first day of the month following execution of this Lease by Lessee or the day after the original expiration date printed in Lessee's current lease with Lessor prior to any extensions thereof ("Effective Date").

This Lease is comprised of two parts. PART I sets forth the variable provisions of this Lease and references the applicable articles in PART II that sets forth the general provisions. To the extent there is a conflict between PART I and PART II, the provisions in PART I are controlling.

PART I

Article No.

1(e) Leased Premises are located at: 920 MAIN STREET, WALPOLE, MA 02081.

3 This Lease begins on the Effective Date specified above and expires 3 years after the Effective Date on March 31, 2005 ("Expiration Date"). Lessee authorizes Lessor to insert in this Lease the date certain for the Expiration Date pursuant to the definition of Effective Date above.

4 Rent: Lessee shall pay Lessor the following monthly base rentals, PLUS THE DOUBLE NET EXPENSES WHICH MAY BE ADJUSTED AT THE END OF EACH 12-MONTH PERIOD AS DESCRIBED IN THIS ARTICLE AND IDENTIFIED ON EXHIBIT A:

Months 1 – 12:	$3,567.00
Months 13 – 24:	$3,567.00
Months 25 – 36:	$3,567.00

20 Notice – Underlying lease(s): The Premises are subject to an underlying lease(s) that will expire on N/A; provided, however, the underlying lease(s) may expire earlier upon N/A days notice by Lessor to its landlord(s).

23(b) Key Management Person designated for Lessee if Lessee is a Business Entity or Joint Lessee: Jordanis Avramidis.

NOTE TO LESSEE: BE SURE TO READ AND UNDERSTAND ALL OF THE PROVISIONS OF PART I AND PART II OF THIS LEASE BEFORE YOU SIGN BELOW.

Executed on the date shown below.

	Equiva Services LLC On Behalf Of
J & M AVRAMIDIS Retailer	Motiva Enterprises LLC Seller
By: /s/ Jordanis Avramidis	By: /s/ Linda Paul Linda Paul
Title: President	Title: Supervisor Contracts
Date: 1-7-2002	Date: 1-29-02

[Defendants' Exhibit 1188]

MOTIVA
ENTERPRISES LLC
Shell, Texaco & Saudi Aramco Working Together

Retailer #: 552824
Cost Center #: 137700

RETAIL FACILITY LEASE

THIS LEASE is entered into between Motiva Enterprises LLC ("Lessor") whose address is 12700 Northborough Drive, Houston, TX 77067, and CYNTHIA KAROL ("Lessee") whose address is 182 PLEASANT ST. ATTLEBORO, MA 02703 and is effective on the later of the first day of the month following execution of this Lease by Lessee or the day after the original expiration date printed in Lessee's current lease with Lessor prior to any extensions thereof ("Effective Date").

This Lease is comprised of two parts. PART I sets forth the variable provisions of this Lease and references the applicable articles in PART II that sets forth the general provisions. To the extent there is a conflict between PART I and PART II, the provisions in PART I are controlling.

PART I

Article No.

1(e) Leased Premises are located at: 182 PLEASANT ST, ATTLEBORO, MA 02703.

3 This Lease begins on the Effective Date specified above and expires 3 years after the Effective Date on 1/31/04 ("Expiration Date"). Lessee authorizes Lessor to insert in this Lease the date certain for the Expiration Date pursuant to the definition of Effective Date above.

4 Rent: Lessee shall pay Lessor the following monthly base rentals, PLUS AN AMOUNT ADJUSTED AT THE END OF EACH 12-MONTH PERIOD AS DESCRIBED IN THIS ARTICLE AND IDENTIFIED ON EXHIBIT A:

Months 1 – 12:	$3,650.00
Months 13 – 24:	$3,852.00
Months 25 – 36:	$4,055.00

21 Notice – Underlying lease(s): The Premises are subject to an underlying lease(s) that will expire on N/A; provided, however, the underlying lease(s) may expire earlier upon N/A days notice by Lessor to its landlord(s).

24(b) Key Management Person designated for Lessee if Lessee is a Business Entity or Joint Lessee: _____.

NOTE TO LESSEE: BE SURE TO READ AND UNDERSTAND ALL OF THE PROVISIONS OF PART I AND PART II OF THIS LEASE BEFORE YOU SIGN BELOW.

Executed on the date shown below.

	Equiva Services LLC On Behalf Of
CYNTHIA KAROL Retailer	Motiva Enterprises LLC Seller
By: /s/ Cynthia Karol	By: /s/ Linda Paul Linda Paul
Title: Dealer	Title: Supervisor Contracts
Date: 12/21/00	Date: 1-16-01

[Defendants' Exhibit 1218]

MOTIVA
ENTERPRISES LLC
Shell, Texaco & Saudi Aramco Working Together

Retailer #: 540204
Cost Center #: 137855

RETAIL FACILITY LEASE

THIS LEASE is entered into between Motiva Enterprises LLC ("Lessor") whose address is 12700 Northborough Drive, Houston, TX 77067, and MACS SHELL SERVICE INC ("Lessee") whose address is 123 EAST MAIN STREET, WEBSTER, MA 01570 and is effective on the later of the first day of the month following execution of this Lease by Lessee or the day after the original expiration date printed in Lessee's current lease with Lessor prior to any extensions thereof ("Effective Date").

This Lease is comprised of two parts. PART I sets forth the variable provisions of this Lease and references the applicable articles in PART II that sets forth the general provisions. To the extent there is a conflict between PART I and PART II, the provisions in PART I are controlling.

PART I

Article No.

1(e) Leased Premises are located at: 135 EAST MAIN ST, SOUTHBRIDGE, MA 01550.

3 This Lease begins on the Effective Date specified above and expires 3 years after the Effective Date on October 31, 2004 ("Expiration Date"). Lessee authorizes Lessor to insert in this Lease the date certain for the Expiration Date pursuant to the definition of Effective Date above.

4 Rent: Lessee shall pay Lessor the following monthly base rentals, PLUS AN AMOUNT ADJUSTED AT THE END OF EACH 12-MONTH PERIOD AS DESCRIBED IN THIS ARTICLE AND IDENTIFIED ON EXHIBIT A:

Months 1 – 12:	$3,411.00
Months 13 – 24:	$3,601.00
Months 25 – 36:	$3,790.00

21 Notice – Underlying lease(s): The Premises are subject to an underlying lease(s) that will expire on 10/31/02; provided, however, the underlying lease(s) may expire earlier upon 90 days notice by Lessor to its landlord(s).

24(b) Key Management Person designated for Lessee if Lessee is a Business Entity or Joint Lessee: Francis A. Marcoux .

NOTE TO LESSEE: BE SURE TO READ AND UNDERSTAND ALL OF THE PROVISIONS OF PART I AND PART II OF THIS LEASE BEFORE YOU SIGN BELOW.

Executed on the date shown below.

	Equiva Services LLC
MACS SHELL	On Behalf Of
SERVICE, INC	Motiva Enterprises LLC
Retailer	Seller
By: /s/ Francis A. Marcoux	By: /s/ Linda Paul
	Linda Paul
Title: President	Title: Supervisor Contracts
Date: 10/23/01	Date: 12-13-01

Signed under protest or if not acceptable
under protest then I sign without protest.

FAM

Linda – Legal Approved

[Defendants' Exhibit 1220]

MOTIVA
ENTERPRISES LLC
Shell Texaco & Saudi Aramco Working Together

Retailer #: 519634
Cost Center #: 137880

RETAIL FACILITY LEASE

THIS LEASE is entered into between Motiva Enterprises LLC ("Lessor") whose address is 12700 Northborough Drive, Houston, TX 77067, and MACS SHELL SERVICE INC ("Lessee") whose address is 123 EAST MAIN STREET, WEBSTER, MA 01570 and is effective on the later of the first day of the month following execution of this Lease by Lessee or the day after the original expiration date printed in Lessee's current lease with Lessor prior to any extensions thereof ("Effective Date").

This Lease is comprised of two parts. PART I sets forth the variable provisions of this Lease and references the applicable articles in PART II that sets forth the general provisions. To the extent there is a conflict between PART I and PART II, the provisions in PART I are controlling.

PART I

Article No.

1(e) Leased Premises are located at: 123 EAST MAIN ST, WEBSTER, MA 01570.

3 This Lease begins on the Effective Date specified above and expires 3 years after the Effective Date on _____ ("Expiration Date"). Lessee authorizes Lessor to insert in this Lease the date certain for the Expiration Date pursuant to the definition of Effective Date above.

4 Rent: Lessee shall pay Lessor the following monthly base rentals, PLUS AN AMOUNT ADJUSTED AT THE END OF EACH 12-MONTH PERIOD AS DESCRIBED IN THIS ARTICLE AND IDENTIFIED ON EXHIBIT A:

Months 1 – 12:	$5,226.00
Months 13 – 24:	$5,517.00
Months 25 – 36:	$5,807.00

21 Notice – Underlying lease(s): The Premises are subject to an underlying lease(s) that will expire on 2/28/02; provided, however, the underlying lease(s) may expire earlier upon 90 days notice by Lessor to its landlord(s).

24(b) Key Management Person designated for Lessee if Lessee is a Business Entity or Joint Lessee: Francis A. Marcoux .

NOTE TO LESSEE: BE SURE TO READ AND UNDERSTAND ALL OF THE PROVISIONS OF PART I AND PART II OF THIS LEASE BEFORE YOU SIGN BELOW.

Executed on the date shown below.

	Equiva Services LLC
MACS SHELL SERVICE INC	On Behalf Of
	Motiva Enterprises LLC
Retailer	Seller
By: /s/ Francis A. Marcoux	By: _____
	Linda Paul
Title: President	Title: Supervisor Contracts
Date: 10/23/01	Date: _____

Signed under protest or if not acceptable
under protest then I sign without protest.

FAM

[Defendants' Exhibit 1265]

MOTIVA
ENTERPRISES LLC
Shell, Texaco & Saudi Aramco Working Together

Retailer #: 510727
Cost Center #: 137854

RETAIL FACILITY LEASE

THIS LEASE is entered into between Motiva Enterprises LLC ("Lessor") whose address is 12700 Northborough Drive, Houston, TX 77067, and RAM CORPORATION INC ("Lessee") whose address is 904 MAIN STREET, SOUTHBRIDGE, MA 01550 and is effective on the later of the first day of the month following execution of this Lease by Lessee or the day after the original expiration date printed in Lessee's current lease with Lessor prior to any extensions thereof ("Effective Date").

This Lease is comprised of two parts. PART I sets forth the variable provisions of this Lease and references the applicable articles in PART II that sets forth the general provisions. To the extent there is a conflict between PART I and PART II, the provisions in PART I are controlling.

PART I

Article No.

1(e) Leased Premises are located at: 904 MAIN ST, SOUTHBRIDGE, MA 01550.

3 This Lease begins on the Effective Date specified above and expires 3 years after the Effective Date on May 31, 2004 ("Expiration Date"). Lessee authorizes Lessor to insert in this Lease the date certain for the Expiration Date pursuant to the definition of Effective Date above.

4 Rent: Lessee shall pay Lessor the following monthly base rentals, PLUS AN AMOUNT ADJUSTED AT THE END OF EACH 12-MONTH PERIOD AS DESCRIBED IN THIS ARTICLE AND IDENTIFIED ON EXHIBIT A:

Months 1 – 12:	$5,899.00
Months 13 – 24:	$6,209.00
Months 25 – 36:	$6,209.00

21 Notice – Underlying lease(s): The Premises are subject to an underlying lease(s) that will expire on N/A; provided, however, the underlying lease(s) may expire earlier upon N/A days notice by Lessor to its landlord(s).

24(b) Key Management Person designated for Lessee if Lessee is a Business Entity or Joint Lessee: _____.

NOTE TO LESSEE: BE SURE TO READ AND UNDERSTAND ALL OF THE PROVISIONS OF PART I AND PART II OF THIS LEASE BEFORE YOU SIGN BELOW.

Executed on the date shown below.

	Equiva Services LLC
RAM CORPORATION	On Behalf Of
INC	Motiva Enterprises LLC
Retailer	Seller
By: /s/ Richard Melanson	By: /s/ Linda Paul
	Linda Paul
Title: President	Title: Supervisor Contracts
Date: 5/10/01	Date: 6-5-01

[Defendant's Exhibit 1293]

MOTIVA
ENTERPRISES LLC
Shell, Texaco & Saudi Aramco Working Together

Retailer #: 503658
Cost Center #: 139656

RETAIL FACILITY LEASE

THIS LEASE is entered into between Motiva Enterprises LLC ("Lessor") whose address is 12700 Northborough Drive, Houston, TX 77067, and JOHN A SULLIVAN ("Lessee") whose address is 141 FRONT STREET, SCITUATE, MA 02066 and is effective on the later of the first day of the month following execution of this Lease by Lessee or the day after the original expiration date printed in Lessee's current lease with Lessor prior to any extensions thereof ("Effective Date").

This Lease is comprised of two parts. PART I sets forth the variable provisions of this Lease and references the applicable articles in PART II that sets forth the general provisions. To the extent there is a conflict between PART I and PART II, the provisions in PART I are controlling.

PART I

Article No.

1(e) Leased Premises are located at: 141 FRONT ST, SCITUATE, MA 02066.

3 This Lease begins on the Effective Date specified above and expires 3 years after the Effective Date on May 31, 2003 ("Expiration Date"). Lessee authorizes Lessor to insert in this Lease the date certain for the Expiration Date pursuant to the definition of Effective Date above.

4 Rent: Lessee shall pay Lessor the following monthly base rentals, plus an amount adjusted at the end of each 12-month period as described in this article:

Months 1 – 12:	$4,089.00
Months 13 – 24:	$4,329.00
Months 25 – 36:	$4,570.00

21 Notice – Underlying lease(s): The Premises are subject to an underlying lease(s) that will expire on N/A; provided, however, the underlying lease(s) may expire earlier upon N/A days notice by Lessor to its landlord(s).

24(b) Key Management Person designated for Lessee if Lessee is a Business Entity or Joint Lessee: _____.

NOTE TO LESSEE: BE SURE TO READ AND UNDERSTAND ALL OF THE PROVISIONS OF PART I AND PART II OF THIS LEASE BEFORE YOU SIGN BELOW.

Executed on the date shown below.

	Equiva Services LLC On Behalf Of
JOHN A SULLIVAN Retailer	Motiva Enterprises LLC Seller
By: /s/ John Sullivan	By: /s/ Linda Paul Linda Paul
Title: Retailer	Title: Supervisor Contracts
Date: 5/3/00	Date: 5-17-00

[Defendants' Exhibit 1232]

MOTIVA
ENTERPRISES LLC
Shell, Texaco & Saudi Aramco Working Together

June 1, 1999

STEPHEN J PISARCZYK II
114 W BOYLSTON ST
WEST BOYLSTON, MA 01583

Re: Shell Motor Fuel Station
Lease/Dealer Agreement
WIC: 22086700303

Dear Shell Branded Retailer:

Please refer to the Motor Fuel Station Lease ("Lease") referenced above between you and Motiva Enterprises LLC ("Motiva") covering the station described above ("Premises") and Dealer Agreement between you and Motiva covering the sale and delivery by Motiva of Shell branded products to you at said Premises (collectively, the "Agreements"). As you may already be aware, we intend to roll-out and implement a new rent program very soon. This effort includes new lease documents and a new facility rent calculation methodology. In order to minimize confusion and provide continuity, in the interim, all leases currently expiring will be extended as described below under the current terms until the new program is ready for implementation.

Please be advised that this letter will serve as our agreement to extend the effective date of expiration of the Agreements from the expiration date contained in the Agreements through the earliest of the execution of a new Lease and Dealer Agreement, the effective date of a notice of non-renewal, or December 31, 1999, subject, of

course, to our agreement that such extension shall be without prejudice to our respective legal positions as they would have existed had the effective date of expiration not been extended. Further, nothing herein shall be construed as a representation or commitment that the Agreements (a) will not be terminated prior to the end of the extension period or (b) will be renewed at the end of the term.

Your agreement to this extension shall be presumed unless you expressly provide us written notice to the contrary.

Very truly yours,

Equiva Services LLC
On Behalf Of
Motiva Enterprises LLC

/s/ Linda Paul

Linda Paul
Supervisor Contracts

cc: Sales Consultant
File

[Defendants' Exhibit 1235]

MOTIVA
ENTERPRISES LLC
Shell, Texaco & Saudi Aramco Working Together

Retailer #:514603
Cost Center#: 137883
Station Location: 114 W BOYLSTON ST
WEST BOYLSTON, MA 01583
Shell Location

February 29, 2000

Stephen J Pisarczy[k]
114 W Boylston St
West Boylston, MA 01583

Re: Month-To-Month Holdover

Dear Retailer:

Please refer to Dealer Agreement and Motor Fuels Agreement ("Agreements") between you and Motiva Enterprises LLC ("Motiva") covering the station described above ("Premises").

Please be advised that this letter will serve as our agreement to extend the effective date of expiration of the Agreements on a Month-To-Month basis or the earliest of the execution of a new Retail Facility Lease and Retail Sales Agreements, or the effective date of a notice of non-renewal, subject, of course, to our agreement that such extension shall be without prejudice to our respective legal positions as they would have existed had the effective date of expiration not been extended. Further, nothing herein shall be construed as a representation or commitment that the Agreements (a) will not be terminated prior to the end of the extension period or (b) will be renewed at the end of the term.

Your agreement to this extension shall be presumed unless you expressly provide us written notice to the contrary.

Very truly yours,

Equiva Services LLC
On Behalf Of
Motiva Enterprises LLC

/s/ Linda Paul

Linda Paul
Supervisor Contracts

cc: Resnick
File

MOTIVA
ENTERPRISES LLC
Shell, Texaco & Saudi Aramco Working Together

[Defendants' Exhibit 1236]

Attn: Contracts
12700 Northborough Drive, MS 1012
Houston, Texas 77067

Retailer #:514603
Cost Center#: 137883
Station Location: 114 W BOYLSTON ST
WEST BOYLSTON, MA 1583
Shell Location

June 22, 2000

STEPHEN J PISARCZYK JR II
114 W BOYLSTON ST
WEST BOYLSTON, MA 01583-0000

Re: Term Extension

Dear Retailer:

Please refer to agreements between you and Motiva Enterprises LLC ("Company") covering the station described above ("Premises").

Please be advised that this letter will serve as our agreement to extend the effective date of expiration of the agreements from the expiration date contained in any franchise agreement or any extension letter you may have received through the earliest of the (a) effective date of a fully executed renewal lease and sales agreements, (b) the effective date of any non-renewal or termination, or (c) [ ] December 31, 2000, subject, of course, to our agreement that such extension, if any, shall be without prejudice to our respective legal positions as they would have existed had the effective date of expiration

not been extended. Further, nothing herein shall be construed as a representation or commitment that the agreements (a) will not be terminated prior to the end of any extended term or (b) will be renewed at the end of the any extended term.

Your agreement to this extension shall be presumed unless you expressly provide us written notice to the contrary.

Sincerely,

Equiva Services LLC
On Behalf Of
Motiva Enterprises LLC

/s/ Linda Paul

Linda Paul
Supervisor Contracts

cc: RESNIK, ROBERT R
File

[Defendants' Exhibit 1055]

Shell Oil Products Company [Shell logo]
400 Blue Hill Drive
Westwood, MA 02090

New England Retail District

Telephone: (617) 461-4600
Fax: (617) 461-4640

Station Location 141 FRONT ST
SCITUATE, MA 2066
Dealer WIC #22067830210

November 30, 1995

JOHN A SULLIVAN
141 FRONT ST
SCITUATE, MA 2066

Re: OFFER OF VARIABLE RENT PROGRAM

Dear Shell Dealer:

This letter confirms the continuation beyond December 31, 1995 of Shell's voluntary variable rent program ("Program") under which you may reduce your operating cost at the above station ("Station"). Shell has been pleased with the broad participation in the Program by its dealers and expects to be able to offer the Program to its dealers through December 31, 1996 and beyond. While the Program remains in effect, Shell will annually review the rate of rent reduction which may be earned, the monthly threshold volumes and the minimum occupancy rent and advise you of any adjustments for the next 12-month period of the Program (Jan-Dec) or until the Program terminates in accordance with its terms.

While the Program is in effect, you may earn a reduction in the following month's rent if you elect to purchase

and receive delivery from Shell at the Station of any gallons of automotive gasoline in excess of the quantity specified below for any month:

AUTOMOTIVE GASOLINE – QUANTITY (IN THOUSANDS OF GALLONS)						
1996	JAN	FEB	MAR	APR	MAY	JUN
	7	0	0	0	0	0
	JUL	AUG	SEP	OCT	NOV	DEC
	0	0	0	0	0	0

Volume changes in the above are the result of scheduled rent changes.

Such reduction will be calculated at the rate of 4.50 cents for each gallon of automotive gasoline purchased and received by you from Shell at the Station during the relevant month in excess of the above quantity, and such amount will be applied to reduce the rent otherwise payable under your lease for such month, but not below a minimum rent of $398. If you do not purchase the quantity of gasoline specified above during a given month, no reduction will be earned and the rent specified in your lease will be payable for the following month.

As a reminder, significant volume attainment is a goal of the Variable Rent Program. The VRP is designed to provide you a volume incentive through the reduction of fixed costs. The program features are designed to encourage you to establish and achieve individual growth goals without adverse impact in subsequent program years.

Any reduction earned by you pursuant to the Program will be applied as follows:

> On approximately the fifth working day following the end of each month that the Program is in effect,

Shell will compute any rent reduction earned during the prior month and credit your subsequent month's rent account for such amount. If you participate in Shell's Bank Draft or Electronic Settlement Program, Shell will draw a draft on or electronically debit your bank account for the difference between your rent payable under your lease and the reduction earned. If no reduction is earned, Shell will draft or debit the full rent payable under your lease. If you do not participate in Shell's Bank Draft or Electronic Settlement Program, you may calculate your reduction earned during each month and deduct such amount from your subsequent month's rent payable and pay Shell the net amount. Differences in your calculation of reduction due and actual reduction earned must be handled promptly. If deliberate or repeated miscalculations occur, they may be considered as a failure by you to pay rent in a timely manner and a violation of your lease. An accounting of all transactions will appear on your monthly Rent and Collection Notice.

With specific regard to the Station and your lease relating thereto, the Program will continue until the earlier of the expiration of your lease, or December 31, 1996, but Shell may, at its option, upon at least 30 days' prior notice to you, given by telephone or regular mail, either (a) discontinue the Program at the end of any month or (b) modify or amend the Program at the beginning of any month.

Upon any renewal of your lease prior to January 1, 1997, Shell may at its option, reoffer the Program to you, with or without modification.

In addition to the foregoing, the Program will terminate upon notice given by Shell to you by telephone or

regular mail in the event that any mandatory or voluntary price or allocation program is implemented by either Shell or a governmental agency.

If you should engage in any improper activity for the purpose of earning for yourself or another Shell dealer a more favorable reduction under this Program than would normally be due at any one or more stations leased by Shell to you, or such other Shell dealer, such improper conduct will be considered by Shell as a ground to disqualify you from further participation in the Program, without prejudice to any other rights available to Shell by reason of such conduct.

The Program is being unilaterally offered by Shell, and your decision to participate is entirely voluntary. Since the Program does not constitute an amendment to your lease, it does not require any acceptance or commitment on your part.

If you elect not to participate in the Program or if the Program should terminate for any reason, as indicated above, the rent provided in your lease will apply in accordance with its terms without any offsetting reduction. It should further be understood that the Program in no way affects Shell's normal practices concerning determination of rent, including the rent specified in any future renewal of your lease.

At your request, your Shell representative will discuss the Program in more detail with you and answer any questions you may have.

Very truly yours,

/s/ Lee J. Fry

District Manager

[Plaintiffs' Exhibit 800]

CINDY KAROL
Rents Paid

YEAR	ACTUAL TOTAL ANNUAL RENT PAID	
1995	$20,723	2/95 takeover lease
1996	$29,963	2/96 1st lease
1997	$34,401	
1998	$43,206	
1999	$59,447	
2000	$99,120	← STIP ENDED
2001	$66,371	2/01 2nd lease
2002	$68,602	
2003	$71,384	

John Sullivan

Net Rent Under VRP	Net Rent Under 1998-1999 STIP	Net Rent Per New Lease	Net Rent After Reappraisal
$2,800 – $3,000 Per month	$3,500 – $4,000 Per month	$10,800 Per month	$5,627 – $6,172 Per month

[Plaintiffs' Exhibit 802]

[Plaintiffs' Exhibit 803]

AKMAL, INC.
RENTS PAID

YEAR	ACTUAL TOTAL ANNUAL RENT PAID	
1994	$31,721	
1995	$37,365	
1996	$41,391	
1997	$38,089	
1998	$33,928	
1999	$44,323	
2000	$95,170	(STIP ENDED)
2001	$96,165	
2002	$114,792	
2003	$115,524	
2004	$107,504 RENT (through 8/04) $161,256 (ANNUALIZED RENT)	

[Plaintiffs' Exhibit 804]

MAC'S SHELL SERVICE, INC.
SOUTHBRIDGE, MASSACHUSETTS LOCATION

RENTS PAID

YEAR	ACTUAL TOTAL ANNUAL RENT PAID
1995	$14,521
1996	$5,253
1997	$6,390
1998	$27,118
1999	$61,784
2000	(STIP ends) $64,893
2001	$63,580
2002	$56,600
2003	$59,240
2004	$46,080 (9 months only) $62,224 (Annualized Rent)

[Plaintiffs' Exhibit 805]

MAC'S SHELL SERVICE, INC.
WEBSTER, MASSACHUSETTS LOCATION
RENTS PAID

YEAR	ACTUAL TOTAL ANNUAL RENT PAID
1996	$43,723
1997	$35,093
1998	$56,352
1999	$100,003
2000	**STIP ends** $103,636
2001	$96,482
2002	$75,088
2003	$79,826
2004	$62,952 (9 months only) $86,238 (Annualized Rent)

[Defendants' Exhibit 1510]

FRAN MARCOUX – WEBSTER
SEPTEMBER 1998 – DECEMBER 1999
TRANSITIONAL REBATES

1998

	Contract Rent	VRP Credit		Net
January	$7,663.00	(4,495.50)		$3,167.50
February	$7,663.00	(4,188.42)		$3,474.58
March	$7,663.00	(3,774.69)		$3,888.31
April	$7,663.00	(4,296.78)		$3,366.22
May	$7,663.00	(4,123.35)		$3,539.65
June	$7,663.00	(4,657.01)		$3,005.99
July	$7,663.00	(4,358.61)		$3,304.39
August	$7,663.00	(4,772.75)		$2,890.25
TOTALS	$61,304.00	(34,667.11)	57%	$26,636.89
		STIP Credit		
September	$7,663.00	(4,214.65)		$3,448.35
October	$7,663.00	(3,831.50)		$3,831.50
November	$7,663.00	(4,214.65)		$3,448.35
December	$7,663.00	(4,214.65)		$3,448.35
TOTALS	$30,652.00	($16,475.45)	53%	$14,176.55

Source: Marcoux 1776-78, 1782, 1786; MACS 277-99; MOMA 1776, 1778, 1782, 1786; Marcoux Exhibit 22

1999

	Contract Rent	STIP Credit		Net
January	$7,663.00	(3,831.50)		$3,831.50
February	$7,663.00	(5,364.10)		$2,298.90
March	$8,046.00	(4,827.60)		$3,218.40
April	$8,046.00	(4,023.00)		$4,023.00
May	$8,046.00	(4,320.00)		$3,726.00
June	$8,046.00	(1,921.20)		$6,124.80
July	$8,046.00	(2,035.30)		$6,010.70
August	$8,046.00	(3,240.21)		$4,805.79
September	$8,046.00	(3,250.41)		$4,795.59
October	$8,046.00	(4,322.00)		$3,724.00
November	$8,046.00	(3,165.18)		$4,880.82
December	$8,046.00	(4,165.44)		$3,880.56
TOTALS	$95,786.00	($44,465.94)	46%	$51,320.06

Source: Marcoux 1960-61, 1963-65, 1968-70, 1978, 1981, 1986, 1990-91, 1993, 1996, 1999, 2002, 2004, 2008-10, 2012-13; MACS 307-329; Marcoux Exhibit 22

[Plaintiffs' Exhibit 812]

RAM CORP., INC.

RENTS PAID

YEAR	ACTUAL TOTAL ANNUAL RENT PAID	EXHIBIT
1996	$27,926	MELANSON 1102-1106
1997	$38,324	MELANSON 1102-1106
1998	$42,098	MELANSON 1102-1106
1999	$69,734	MELANSON 1102-1106
2000	$92,713	MELANSON 1102-1106
2001	$69,057 (out of business in 10/01) Annualized Rent – $91,296	MELANSON 1102-1106

[Plaintiffs' Exhibit 815]

SID PRASHAD
RENTS PAID

YEAR	ACTUAL TOTAL ANNUAL RENT PAID	EXHIBIT
1995	$51,480	PRASHAD 233-249
1996	$38,460	PRASACCT 72-82
1997	$48,480	PRASACCT 58-71
1998	$35,316	PRASHAD 141
1999	$47,594 (entered into first Motiva lease 8/1/99)	PRASHAD 138
2000	$73,000	PRASHAD 136
2001	$76,380	PRASHAD 702
2002	$77,725	PRASHAD 704-745
2003	$81,613	PRASHAD 704-745
2004	$84,615 (Annualized Rent)	PRASHAD 704-745

[Plaintiffs' Exhibit 817]

J&M AVRAMIDIS, INC.
RENTS PAID

YEAR	ACTUAL TOTAL ANNUAL RENT PAID	EXHIBIT
1994	$18,503	AVRAMIDIS 383
1995	$16,005	AVRAMIDIS 382
1996	$6,604	AVRAMIDIS 381
1997	$11,023	AVRAMIDIS 380
1998	$30,741	AVRAMIDIS 379
1999	$47,772	AVRAMIDIS 378
2000	$55,701	AVRAMIDIS 377
2001	$61,248	AVRAMIDIS 441
2002	$61,550	AVRAMIDIS 440
2003	$62,796	AVRAMIDIS 1659

[Plaintiffs' Exhibit 823]

STEPHEN PISARCZYK
114 W. BOYLSTON LOCATION
RENTS PAID

YEAR	ACTUAL TOTAL ANNUAL RENT PAID	EXHIBIT
1994	$23,850	PISARCZYK 666
1995	$27,908	PISARCZYK 1739
1996	$22,291	PISARCZYK 664
1997	$34,041	PISARCZYK 618
1998	$24,913	PISARCZYK 672
1999	$43,768	PISARCZYK 670
2000	$33,801 (7 months only – out of business in 7/00)	PISARCZYK 2993

[Defendants' Exhibit 1508]

AKMAL, INC.

SUMMARY FINANCIAL INFORMATION

Year	Total Sales	Gross Profit	Officer's Salary	Rent	Net Income
1994	$1,767,129	$263,957	$13,000	$31,721	$38,785
1995	$2,003,448	$293,983	$13,000	$37,365	$31,435
1996	$1,705,105	$253,524	$13,000	$41,391	$29,406
1997	$1,665,543	$205,364	$13,250	$38,089	$21,333
1998	$1,438,878	$205,915	$23,250	$33,928	$5,798
1999	$1,813,972	$232,689	$26,000	$44,323	$18,212
2000	$2,125,968	$327,611	$24,000	$95,170	$52,491
2001	$2,077,904	$353,305	$24,000	$96,165	$97,836
2002	$1,907,064	$362,021	$25,500	$114,792	$88,870
2003	$2,187,921	$327,635	$25,500	$115,524	$43,767

Source: Exhibits 1000; P-803

[Defendants' Exhibit 1516]

MAC'S SHELL SERVICE, INC.
SUMMARY FINANCIAL INFORMATION
DEALER INCOME

YEAR	FRANCIS MARCOUX COMPENSATION	NET INCOME	FRANCIS MARCOUX COMPENSATION + NET INCOME
1994	$114,500	$25,034	$139,534
1995	$112,680	($6,733)	$105,947
1996	$146,500	$52,691	$199,191
1997	$138,000	$19,884	$157,884
1998	$148,000	$69,063	$217,063
1999	$164,360	($6,153)	$158,207
2000	$153,837	$125,362	$279,199
2001	$103,000	$103,387	$206,387
2002	$115,655	$37,133	$152,788
2003	$157,307	$54,884	$212,191
2004 (annualized)	$78,000	$115,100	$193,100
Sum: 2000-2004	$607,799	$435,866	$1,043,665

SOURCES: MARCOUX 3762, MARCOUX 3773; Exhibit 1093

[Defendants' Exhibit 1518]

R.A.M. CORPORATION
SUMMARY FINANCIAL INFORMATION

NET INCOME

YEAR	NET INCOME
1994	$87,104
1995	$70,561
1996	$65,599
1997	$429
1998	$21,970
1999	$28,022
2000	$56,989
2001	$188,372

SOURCE: Exhibit 1093

SCHEDULE 3E

MAC'S SHELL SERVICE, INC. (MARCOUX)

Analysis of Profitability Compared to Industry

Year Ended 12/31:	2003	2002	2001	2000	1999	1998	1997	1996	1995	1994
Revenue	8,069,633	7,571,550	7,840,069	8,378,822	7,305,040	6,486,486	6,914,039	7,138,720	6,227,852	6,142,369
Net Income (pre-tax)	54,884	37,133	103,387	125,362	(6,153)	69,063	19,884	52,691	(6,733)	25,034
Plus: Owner's Compensation	157,307	115,655	103,000	153,837	164,360	148,000	138,000	146,500	112,680	114,500
Profit Before Owner's Compensation	212,191	152,788	206,387	279,199	158,207	217,063	157,884	199,191	105,947	139,534
As % of Revenue	2.6%	2.0%	2.6%	3.3%	2.2%	3.3%	2.3%	2.8%	1.7%	2.3%
Industry Profit % (A)	N/A	N/A	1.3%	2.2%	2.7%	2.6%	3.2%	3.4%	3.7%	3.4%

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[DEFENDANTS' EXHIBIT 1537]

SCHEDULE 1E

AKMAL, INC.

Analysis of Profitability Compared to Industry

Year Ended 12/31:	2003	2002	2001	2000	1999	1998	1997	1996	1995	1994
Revenue	2,187,921	1,907,064	2,077,904	2,125,968	1,813,972	1,438,878	1,665,543	1,705,105	2,003,448	1,767,129
Net Income (pre-tax)	43,767	88,870	97,836	52,491	18,212	5,798	21,333	29,406	31,435	38,785
Plus: Owner's Compensation	25,500	25,500	24,000	24,000	26,000	23,250	13,250	13,000	13,000	13,000
Profit Before Owner's Compensation	69,267	114,370	121,836	76,491	44,212	29,048	34,583	42,406	44,435	51,785
As % of Revenue	3.2%	6.0%	5.9%	3.6%	2.4%	2.0%	2.1%	2.5%	2.2%	2.9%
Industry Profit % (A)	N/A	N/A	1.3%	2.2%	2.7%	2.6%	3.2%	3.4%	3.7%	3.4%

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[DEFENDANTS' EXHIBIT 1540]

SCHEDULE 2D

PLEASANT ST. SHELL (Karol)

Analysis of Profitability Compared to Industry

Year Ended 12/31:	2003	2002	2001	2000	1999	1998	1997	1996	1995	1994
Revenue	2,091,199	2,008,137	1,972,161	2,308,549	1,968,646	1,643,467	1,817,861	1,888,661	1,669,455	1,763,383
Net Income (pre-tax)	28,822	22,952	38,568	8,388	39,683	25,130	28,832	25,710	30,446	60,112
Plus: Owner's Compensation (A)										
Profit Before Owner's Compensation	28,822	22,952	38,568	8,388	39,683	25,130	28,832	25,710	30,446	60,112
As % of Revenue	1.4%	1.1%	2.0%	0.4%	2.0%	1.5%	1.6%	1.4%	1.8%	3.4%
Industry Profit % (B)	N/A	N/A	1.3%	2.2%	2.7%	2.6%	3.2%	3.4%	3.7%	3.4%

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[DEFENDANTS' EXHIBIT 1543]

SCHEDULE 5E

J&M AVRAMIDIS INC.

Analysis of Profitability Compared to Industry

Year Ended 12/31:	2003	2002	2001	2000	1999	1998	1997	1996	1995	1994
Revenue	697,272	788,737	879,612	546,252	748,563	886,295	1,142,644	1,249,578	1,093,630	1,067,730
Net Income (pre-tax)	(50,081)	(16,917)	(36,590)	(7,123)	(8,192)	(22,120)	(28,351)	(2,714)	(19,895)	(13,861)
Plus: Owner's Compensation	62,400	62,400	62,400	63,600	62,400	62,400	62,400	62,400	62,400	55,400
Profit Before Owner's Compensation	12,319	45,483	25,810	56,477	54,208	40,280	34,049	59,686	42,505	41,539
As % of Revenue	1.8%	5.8%	2.9%	10.3%	7.2%	4.5%	3.0%	4.8%	3.9%	3.9%
Industry Profit % (A)	N/A	N/A	1.3%	2.2%	2.7%	2.6%	3.2%	3.4%	3.7%	3.4%

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[DEFENDANTS' EXHIBIT 1546]

SCHEDULE 8D

HARBORSIDE SHELL (Sullivan)

Analysis of Profitability Compared to Industry

Year Ended 12/31:	2000	1999	1998	1997	1996	1995	1994
Revenue	1,731,645	1,970,007	1,826,975	2,187,861	2,174,177	2,097,551	1,998,997
Net Income (pre-tax)	2,434	(17,626)	27,218	41,450	23,223	47,256	46,237
Plus: Owner's Compensation (A)	———	———	———	———	———	———	———
Profit Before Owner's Compensation	2,434	(17,626)	27,218	41,450	23,223	47,256	46,237
As % of Revenue	0.1%	-0.9%	1.5%	1.9%	1.1%	2.3%	2.3%
Industry Profit % (B)	2.2%	2.7%	2.6%	3.2%	3.4%	3.7%	3.4%

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[DEFENDANTS' EXHIBIT 1555]

SCHEDULE 4E

R.A.M. CORPORATION (Melanson)

Analysis of Profitability Compared to Industry

Year Ended 12/31:	2001	2000	1999	1998	1997	1996	1995	1994
Revenue	2,027,442	2,663,050	2,483,494	2,283,983	2,445,328	2,301,840	2,049,291	1,910,764
Net Income (pre-tax)	24,175	56,989	28,022	21,970	429	65,599	70,561	87,104
Plus: Owner's Compensation	17,900	22,800	22,800	22,800	22,800	21,982	22,800	22,800
Profit Before Owner's Compensation	42,075	79,789	50,822	44,770	23,229	87,581	93,361	109,904
As % of Revenue	2.1%	3.0%	2.0%	2.0%	0.9%	3.8%	4.6%	5.8%
Industry Profit % (A)	1.3%	2.2%	2.7%	2.6%	3.2%	3.4%	3.7%	3.4%

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[DEFENDANTS' EXHIBIT 1558]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

IN RE Shell Oil Products Co. Dealer Franchise Litigation	MDL Docket No. 1461 United States District Court for the District of Massachusetts Civil Action No. 01-CV-11300 RWZ United States District Court for the District of New Hampshire Civil Action No. 01-CV-430 United States District Court for the District of Rhode Island Civil Action No. 01-CV-514T

DEFENDANTS' MOTION FOR JURY INSTRUCTIONS

Defendants, Shell Oil Company, Shell Oil Products Company LLC (f/k/a Shell Oil Products Company), and Motiva Enterprises, LLC request that the jury be instructed as to the claims that have been presented in this case according to the proposed instructions attached hereto.

Dated: December 3, 2004

* * * * *

(4) PMPA Claims

The relationship between Plaintiffs, as franchised gasoline service station dealers on the one hand, and Defendants, as franchisors on the other, is governed in part by a federal statue called the Petroleum Marketing Practices Act ("PMPA"). In particular, the PMPA governs when and how the franchise relationship between Defendants and Plaintiffs may be terminated or nonrenewed.

The statute contained a general prohibition against the termination or nonrenewal of a franchise relationship except under certain circumstances.[11] A franchise relationship consists of three statutory components: (1) the contract to use Shell's trademark; (2) the contract for the supply of motor fuel; and (3) the lease of the premises.[12]

PMPA Claims for Constructive Termination of Final Shell Leases

Plaintiffs claim that by terminating the rent subsidy program as of January 1, 2000, and thereafter changing the actual rent set forth in the Final Shell Leases, Defendants have terminated Plaintiffs' franchises in violation of the Petroleum Marketing Practices Act, also known as the "PMPA."

Because Plaintiffs in this case renewed their franchise agreements and continued to operate their franchised Shell branded gasoline service stations under the new retail facility leases containing program rent after Defendants terminated the VRP and eliminated the subsequent rent subsidy program as of January 1, 2000, Plaintiffs are not claiming that their franchises were actually terminated. Instead, Plaintiffs are alleging that Defendants' conduct resulted in a "constructive termination" of their franchises in violation of the PMPA.

A "constructive termination" in the context of the PMPA has been defined as an assignment that *either* (A) terminates one of the three statutory components of the franchise agreement or (B) violates state assignment law.[13] There has been no claim in this case that when

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[11] 15 U.S.C. §§ 2802(a), (b).

[12] 15 U.S.C. § 2801(1)(B).

[13] *Riverdale Enterprises Inc. v. Shell Oil Co.*, 41 F. Supp. 2d 56, 62 (D. Mass. 1999); *see, also, Chestnut Hill Gulf, Inc. v. Cumberland*

Shell transferred its assets to Motiva in July, 1998, it violated any state assignment law. Plaintiffs are claiming that the termination of the rent subsidy program and requirement that Plaintiffs pay the rent set forth in their Final Shell Leases breached those contracts in violation of the PMPA.

In order to prove a constructive termination under the PMPA, each plaintiff must establish by a preponderance of the evidence that his or her Final Shell Lease was terminated.

PMPA Claim for "Constructive Nonrenewal" of New Motiva Leases

Plaintiffs further allege that Defendants' conduct in charging rent under the new rent formula and making other changes under the new Motiva Retail Facility Leases was for the purpose of converting Plaintiffs' stations into company operated locations or preventing their renewal in violation of the PMPA.

A constructive nonrenewal occurs when a franchisor and franchisee fail to agree to changes or additions to provisions of the franchise agreements. You must first determine for each plaintiff whether that plaintiff and the defendants failed to agree to the new Motiva Lease. If you find that there was an agreement, then you must find for the defendants. If you find that there was no such agreement, then you must consider whether the franchisor's decision to make such changes or additions was

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Farms, Inc., 940 F.2d 744, 750 (1st Cir. 1991) (noting that "There is nothing in the language of the [PMPA] stating or suggesting that a valid assignment of franchises as part of the sale of the assets of a refiner-distributor constitutes, without more, a termination or nonrenewal of the franchise relationships between the selling franchisor and its franchisees.")

made in good faith and in the normal course of business and was not for the purpose of either (1) converting the franchisee's leased premises to a company operated location or (2) otherwise preventing the renewal of the franchise relationship.[14]

If the defendants have proven by a preponderance of the evidence that their decision to move to a Retail Facility Lease that contains an asset-based rent was made in good faith and in the normal course of business and not for the purpose of converting that plaintiff's station to a company operated location or otherwise preventing the renewal of their franchise relationship, you must find for Defendants on the PMPA claims.

* * * * *

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[14] 15 U.S.C. § 2802(b)(3)(A).

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

IN RE Shell Oil Products Co. Dealer Franchise Litigation	MDL Docket No. 1461 United States District Court for the District of Massachusetts Civil Action No. 01-CV-11300 RWZ United States District Court for the District of New Hampshire Civil Action No. 01-CV-430 United States District Court for the District of Rhode Island Civil Action No. 01-CV-514T

DEFENDANTS' PROPOSED SUPPLEMENTAL AND AMENDED JURY INSTRUCTIONS

Defendants, Shell Oil Company, Shell Oil Products Company, LLC (f/k/a Shell Oil Products Company), and Motiva Enterprises LLC, offer the following proposed supplemental and amended jury instructions. In some instances, these jury instructions propose changes to instructions suggested by plaintiffs; in others, they propose additional jury instructions to conform to the evidence.

* * * * *

NATURE OF CLAIMS AND DEFENSES

(Revises Plaintiffs' Requested Instruction No. 10)

* * * * *

Second, plaintiffs claim that defendants have violated a federal statute called the Petroleum Marketing Practices Act (PMPA). The PMPA says that a franchisor may not terminate a franchise relationship—which consists of three components: a lease, fuel supply agreement, and a

trademark—before the agreed expiration of its term. The statute says that if a franchisor (Shell) assigns its franchise contracts to another party (Motiva), Motiva is bound by these contracts the same as Shell was. If, as a result of the assignment, there was a material change in the parties' rights or obligations under the lease such that one of the elements of the franchise relationship is lost, then there might be, under the PMPA, what is called a "constructive termination." Plaintiffs claim that the termination of the rent subsidy programs constructively terminated the franchise agreements.

Defendants deny that there was any material change in the parties' rights or obligations under the lease as a result of the assignment to Motiva and, therefore, that there was no constructive termination. Defendants also argue that the termination of the subsidy programs was not prohibited under the lease agreement and, in any event, did not constructively terminate the franchise relationship because the PMPA excludes breach of contract claims such as plaintiffs' claims regarding the termination of the subsidy programs, when the franchisee has renewed his or her franchise agreements and there has been no termination or nonrenewal of the franchise relationship.

Third, plaintiffs claim another violation of the PMPA, a constructive nonrenewal. The statute imposes limits on a franchisor's ability not to renew a franchise arrangement even after the expiration of the agreement. Plaintiffs say that Motiva's leases during the 2000-2004 time period contained rent and other provisions designed to prevent plaintiffs from renewing their leases and to allow Motiva to convert the stations to company owned ones. Defendants deny that the new leases contained any improper rent or other provisions, and further argue that

the PMPA requires that a dealer challenge any new proposed lease when it is offered and that, by signing it, the dealer has agreed to the new terms.

* * * * *

[Dated: December 6, 2004]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Civil Action No. 01-11300-RWZ

FRANCIS MARCOUX, et al.,
Plaintiffs,

vs.

SHELL OIL PRODUCTS CO. LLC, et al.,
Defendants.

TRANSCRIPT OF CHARGE CONFERENCE
December 6, 2004

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* * * * *

[4] MR. SANSON: Your Honor, with respect to constructive termination, I think a case that the plaintiffs have repeatedly cited and it is a First Circuit case is Chestnut Hill and I was looking at it and I, if I can, I'd like to read—

THE COURT: I have it.

MR. SANSON: —two sentences from it. I'm reading at—I have a printout page, it's Section II, Roman II. I don't know what version you have. It's at page 18 of one reporter, 751 of another.

THE COURT: Which part of Roman II?

MR. SANSON: It's starting with the fifth paragraph [5] under Roman II, which starts, "A two-part test has been used."

THE COURT: Yeah.

MR. SANSON: "To determine whether the assignment of a franchise results in its constructive termination, thereby implicating the act. To sustain a claim under the PMPA that a franchisor assigned and thereby constructively terminated a franchise agreement, the franchisee must prove either, one, that by making the assignment the franchisor breached one of the three statutory components of the franchise agreement, the contract to use the refiner's trademark, the contract for the supply of motor fuel, or the lease of the premises and thus violated the PMPA; or two, that the franchisor made the assignment in violation of state law and thus the PMPA was invoked."

I don't believe there's any claim that the assignment was in violation of state law.

THE COURT: Sure. The breach of contract.

MR. SANSON: That the assignment, that the assignment breached state law, assigning it to Motiva somehow breached state law?

THE COURT: I can't believe this is correct because that's not what the statute says.

MR. SANSON: I believe it is, your Honor. This is the First Circuit.

THE COURT: Let me pass that for the moment.

[6] MR. SANSON: Well, I think this is what—I think this is—if there's a place in the statute, I have a copy of the statute with me, I believe this is exactly what the issue here is, that they have not alleged a violation of state law; they have alleged that by making [the] assignment, there was a breach. And as the case law makes clear, the breach has to relate to one of the three statutory components of the franchise relationship. So that that's the relevant inquiry for this claim.

THE COURT: Well, what does Section 2802 mean when it says that "except as otherwise provided no franchisor may terminate any franchise prior to the conclusion of the term"?

MR. SANSON: Correct. And there was no termination prior to the term.

THE COURT: But that's what they're saying, there was a constructive termination by breaching the terms of the agreement, of the lease agreement, which is one of the franchise agreements.

MR. SANSON: Correct. And what the PMPA makes clear is if what the franchisee is alleging is that the franchisor breached the agreement, that is a breach of contract claim[;] that is not a PMPA claim, that is not an actual termination, that is not a constructive termination. The termination under the PMPA goes to the termination of the relationship, the franchise relationship. It doesn't cover [7] anything else. It's a creation of Congress regarding that relationship between a franchisor and a franchisee under the Petroleum Marketing Practices Act. And that relationship has three components to it.

THE COURT: Any one of which terminated would amount to a termination of the franchise.

MR. SANSON: Exactly. Absolutely.

THE COURT: Now, what the plaintiffs' position is is that the breach of the amended lease was a termination, could be deemed to amount to a termination of the lease agreement.

MR. SANSON: And if it were a lease or a—well, they're claiming that it was a termination of the lease agreement or a breach of the lease agreement.

THE COURT: A breach that could be deemed to be a termination under the PMPA. That's as I understand the plaintiffs' position.

Can I just go forward and tell [you what] I propose to tell the jury because this is one of the things that I do address. Now maybe I'm wrong about it, but I think it would be best if I just go through the charge and then have you comment on it.

Let me just tell you at the outset that there is no chance, I think there's a zero chance that I will tell the jury anything in precise legal words that either of you asked me to [8] give. I have to do it in my own words, otherwise I can't explain it to the jury. So don't expect to hear what you gave me, although I very much—I acknowledge what you gave me and I thank you because it is helpful for me to find my own words for it, but that's what I did.

* * * * *

[48] MR. SANSON: * * * Number five talks about constructive termination. We were discussing that earlier, and I had been quoting from the Chestnut Hill case and I believe your Honor was referring to the PMPA 2802(b).

THE COURT: I mean, I think there is a slight difference between a mere breach and whether that breach amounts to a constructive termination, and that's for the jury to decide. That's how I put it to them.

MR. SANSON: The—it seems that the issue of the assignment—as I understand the case law that constructive termination comes into play in an assignment context, if the assignment itself is the event that gives rise to a loss of—

THE COURT: That's not the allegation here.

MR. SANSON: Correct. And that's why we believe they have not stated a claim for constructive termination.

THE COURT: Well, I mean, you and I disagree about that, and you and the plaintiffs disagree about it. I happen to think the plaintiffs more correctly state the law on this and so you certainly, if you lose on this, can appeal it. I do believe that if there is a lease amendment and if there was the breach of the lease as amended, then there may be a constructive termination; but the jury has to decide whether it amounts to that. It may not. Even the way I phrase it, you may not end up having—losing on this.

[49] MR. SANSON: And the standard for determining whether or not the breach is of such a magnitude to cause a constructive termination is, I believe, whether the changes were so onerous as to cause problems.

THE COURT: Something like that. What do you want me to say?

MR. SANSON: That had the—

THE COURT: At one point I think I said make life miserable for them. You didn't like that either.

MR. SANSON: Correct. And later it's discourage, which I don't like either.

THE COURT: Well, I mean, it's got to be something in there that causes grief. It's not a constructive termination if it doesn't. And I think merely the breach alone is not. It's got to be the breach that causes some difficulties. And I'll—

MR. SANSON: I think that's right.

THE COURT: Well, tell me what you want me to say if you don't like what I did say.

MR. SANSON: Well, again what I think [it] requires is loss of one of the three elements within the context—

THE COURT: Well, but if you say that, then the breach of the lease agreement would in and of itself be a constructive termination because it—the breach—

MR. SANSON: It's breach. It's a breach of a [50] contract. And that's fully addressable by any plaintiff in any PMPA relationship, that if the franchisor ever breaches any term, they have an immediate cause of action. It's not under the PMPA, it's for breach of contract. And if it's a horrendous breach, they have a very strong—

THE COURT: If there was a problem with it, since we also have the breach of contract here, we can ignore whatever the jury says about this. It doesn't affect the validity of the verdict in the end. I think it's okay as it is; but if the Court of Appeals says it isn't, it throws out the jury's answer as to this and leaves in the breach of contract. It's a harmless error, if it's error, I think.

MR. SANSON: Our view is by including it and presenting it as another, the jury might say well, we'll give them this and not this. There's a lot of things that can go on with multiple claims that shouldn't be presented. I understand what you're saying in terms of the damages are the same and so there shouldn't be double damages, but by presenting two claims, we believe that's prejudicial.

In terms of trying to—and I think the exact problem the Court is commenting on about, well, how onerous or how substantial does it have to be is precisely why constructive termination requires loss of one of the three elements, to avoid exactly that dilemma[as] to where to draw some fuzzy line. It's a very clear line. If you lose one of the [51] three elements, you've got a constructive termination. If you don't, you don't.

So I think that we object to this instruction—or verdict form. I think it reduces the problem to the extent the Court makes it clear or suggests that it has to be so onerous as to be the equivalent of a termination or to deny the franchisee the value or benefit of the franchise relationship. I think it's on something of that nature that—

THE COURT: I'll think about that.

MR. SANSON: —that might be appropriate.

* * * * *

MR. SANSON: Okay. Claim C on the bottom of page 6 is the constructive nonrenewal. We believe that the case law is very clear that there isn't such a thing as constructive nonrenewal. There can be or at least arguably there could be a constructive termination in that you've got an ongoing relationship and there's been an assignment, which has removed one of the elements and, therefore, there's been a termination in the middle of it.

A nonrenewal is necessarily an event that occurs at the time of the offering of a new lease, new franchise agreement. And the way the PMPA is set up is it establishes a process so that there is certainty between the parties as to [52] whether there's an agreement or not. The PMPA requires a franchisor to offer renewal paper to a franchisee more than 90 days prior to the expiration of the old paper. The franchisee then has the opportunity to review that and determine do they agree or not. And if they don't, that's why they have the 90-day period to consider that and then bring an action under the PMPA complaining about the nonrenewal.

So the PMPA requires the franchisor, puts an extra burden on them, to say here's your new renewal paper 120 days ahead of time, do you accept it or not? Then it

puts the burden on the franchisee to say, all right, here's my new paper, do I like it or not? If I like it, I sign it and then we have an agreement, which then goes on and could be breached and so forth. But at least we know the agreement. If I don't like it, then I don't accept it and I can challenge it, and now we know we don't have an agreement. So you either have a renewal or you don't.

So constructive nonrenewal I think is almost a contradiction in terms because of the structure of the PMPA that it, unlike any other contract, it sets out these time periods, it provides for a franchisee to come into court and to seek an injunction, preventing the new terms from going into effect until there's been a resolution of these new terms. And so that's what plaintiffs had the right to do under the PMPA.

And, again, we've mentioned this before but the [53] Dersch Energies case[ ] and subsequent circuit cases since then have uniformly held that that's the process. You either sign or you don't. You can't have it both ways. The one case they cite, circuit case, Pro Sales, was prior to Dersch, was, in our view, inconsistent and rejected by Dersch, said, well, okay, you don't have to sign it, or you can sign it under protest if you promptly take action to challenge it. And that certainly wasn't done here.

So as I understand their claim for constructive nonrenewal, it's that the new paper was—they get to sign it and operate under it and also challenge it. And we believe under those facts there hasn't been a constructive or any kind of a nonrenewal.

THE COURT: Okay. You included a request on constructive nonrenewal, which is substantially what I gave, but I understand that you object to the idea all together.

MR. SANSON: Yes, I want to make that clear for the record.

THE COURT: That's fine.

MR. SANSON: And that we don't believe that exists certainly under these facts.

THE COURT: Okay.

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Civil Action No. 01-11300-RWZ

FRANCIS MARCOUX, et al.,
Plaintiffs,

vs.

SHELL OIL PRODUCTS CO. LLC, et al.,
Defendants.

TRANSCRIPT OF JURY TRIAL
DAY FOURTEEN
December 7, 2004

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* * * * *

[98] [THE COURT (instructing the jury):] The PMPA, the Petroleum Marketing Practices Act, is a federal statute designed to protect franchisees, and it provides that franchisors may terminate franchise relationships—and we're talking in not just the lease, but the constellations of agreements that constitute the franchise. Franchisors may terminate the franchise relationship or fail to renew it only in accordance with the [99] statute. Specifically, the franchisor may terminate only if a franchisee does not carry out its obligations, or if some event occurs that reasonably requires the end of the franchise relationship, or if the parties agree in writing to end the relationship and follow the procedures in the statute.

If a franchisor, Shell—well, in this case Shell—assigns a franchise to another—in this case Motiva—then the lat-

ter is bound by the statute and the agreements and may not take any action to terminate the contract or to make material changes in the contract that are so [ ] onerous that it causes problems for the franchisee. That is, whether it's Shell we're talking about or the successor of Shell, Motiva, they're both bound by the statutes, bound by the agreements.

Now, if a franchisor makes a change[ ] that may be regarded as equivalent [to] termination, what we call a constructive termination, then the franchisor is in violation of the statute. I note that the franchise arrangement consists of three pieces, the lease agreement, the sale of product agreement, the gas, and the permission to use the franchise—the trademark. That constitutes the franchise, those three things.

Now, if the leases were amended to include the subsidy and then the subsidy was ended before the expiration of the lease, the ending of the subsidy may amount to constructive [100] termination. You will have to decide whether that change was such a material change that it effectively ended the lease, even though the plaintiffs continue to operate the business. Now, the evidence as to this question is the same that you consider under Claim A, but the question is slightly different. It's not simply was the lease breached, but did that breach amount to a constructive termination. Was it effectively the end of the franchise relationship?

Nonetheless, you should consider this question only as to those plaintiffs you found had their leases amended. If somebody didn't have their lease amended, then we don't need to consider it. If you determine the lease wasn't breached, there wasn't a constructive termination of the lease either.

So you need to decide whether the plaintiff has proven that the lease was amended, that there was a breach of the lease, and that that breach was so egregious as to amount to a termination of the franchise relationship.

Now, question six calls for the same answer as [ ] does three. Note that the plaintiff will only collect once if you found damages in response to both, but it just seemed to me neater and cleaner to have the damages question separately. But it's the same elements of damages and the same response as question three.

* * * * *

[101] Claim C is the nonrenewal part of the case under the federal statute, the PMPA. And this claim is similar legally to Claim B. The statute also specifically describes the conditions under which a franchisor may refuse to renew a franchise. Mostly, again, having to do with the dereliction of any franchisee. You know, franchisee never pays bills, doesn't keep the station going, doesn't do a good job, then it may be that the franchisor may decide to terminate the franchise.

The statute does allow a franchisor to amend a franchise agreement and to add to them but only if the changes are not designed in bad faith to bring about the conversion of the franchise operated stations to company-operated ones. So a franchisor may amend but not—but not for the purpose of undoing the franchise arrangement and causing the franchisees to sell so that they can then have company stores.

Now, here again, even though the franchisor says it wants to renew, if the proposed terms violate the statute, that may be deemed to be a constructive nonrenewal. Even if the plaintiffs signed the agreement and continued to operate the business, the terms may amount to a con-

structive nonrenewal. The question for you is were the rent increases and other new provisions in the Motiva leases designed to discourage the plaintiffs from renewing and to enable Motiva to [102] convert the stations—to convert the stations to company-owned ones?

Consider all the evidence concerning each plaintiff's situation[ ], the market conditions, the economic forces, the consolidations of two companies and whatever problems may have come from that, and then determine whether under all the circumstances the new leases were constructively nonrenewed, even though they were handed to the franchisees. If you find that the plaintiff proved a constructive nonrenewal, then the answer to question eight is yes and you go to nine and ten. If you find the plaintiff did not so prove, the answer to question eight is no.

* * * * *

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

IN RE SHELL OIL PRODUCTS CO. DEALER FRANCHISEES LITIGATION	MDL Docket No. 1461 United States District Court for the District of Massachusetts Civil Action No. 01-CV-11300 United States District Court for the District of New Hampshire Civil Action No. 01-CV-430 United States District Court for the District of Rhode Island Civil Action No. 01-CV-514T

SPECIAL VERDICT

Claim A. Breach of Lease Agreements by Elimination of the Rent Subsidy Program

1. Did each plaintiff and Shell orally and by their course of conduct amend the written leases to provide for the calculation of rent in accordance with a rent subsidy program?

	YES	NO
Cynthia Karol (S. Attleboro, MA)	✓	___
John Sullivan (Scituate, MA)	✓	___
Akmal, Inc. (Akmal Moawed) (South Boston, MA)	✓	___
Sid Prashad (Worcester, MA)	✓	___

Mac's Shell Service (#1) (Francis Marcoux) (Southbridge, MA)	✓	___
Mac's Shell Service (#2) (Francis Marcoux) (Webster, MA)	✓	___
RAM Corp. (Richard Melanson) (Southbridge, MA)	✓	___
J&M Avramidis, Inc. (Jordan Avramidis) (Walpole, MA)	✓	___
Stephen Pisarczyk (West Boylston, MA)	✓	___

If the answer is YES as to any plaintiff, please answer Questions 2 and 3 as to that plaintiff. If the answer is NO as to any plaintiff, please go directly to Question 8 as to that plaintiff.

2. Did defendants' elimination of the rent subsidy program (VRP and STIP) breach the leases between Shell and the following plaintiffs?

	YES	NO
Cynthia Karol (S. Attleboro, MA)	✓	___
John Sullivan (Scituate, MA)	✓	___
Akmal, Inc. (Akmal Moawed) (South Boston, MA)	✓	___
Sid Prashad (Worcester, MA)	✓	___

Mac's Shell Service (#1) (Francis Marcoux) (Southbridge, MA)	✓	___
Mac's Shell Service (#2) (Francis Marcoux) (Webster, MA)	✓	___
RAM Corp. (Richard Melanson) (Southbridge, MA)	✓	___
J&M Avramidis, Inc. (Jordan Avramidis) (Walpole, MA)	✓	___
Stephen Pisarczyk (West Boylston, MA)	✓	___

If you answered YES to both Questions 1 and 2 as to any plaintiff, please answer next Question 3 as to that plaintiff. If you did not answer YES to both Questions 1 and 2 as to any plaintiff, you need not answer Questions 3 and 4 as to that plaintiff.

3. The damages of any plaintiff as to whom you answered YES to both Questions 1 and 2 consist of two elements.

a. The amount of any STIP subsidy not paid to that plaintiff from the date of the termination of the STIP to the date on which that plaintiff's lease expired.

b. The diminution of the value of that plaintiff's business as a result of the termination of the STIP.

These damages are as follows:

Cynthia Karol (S. Attleboro, MA)	$119,547.
John Sullivan (Scituate, MA)	$123,271.

Akmal, Inc. (Akmal Moawed) (South Boston, MA)	$217,771.
Sid Prashad (Worcester, MA)	$102,838.
Mac's Shell Service (#1) (Francis Marcoux) (Southbridge, MA)	$158,564.
Mac's Shell Service (#2) (Francis Marcoux) (Webster, MA)	$186,582.
RAM Corp. (Richard Melanson) (Southbridge, MA)	$106,011.
J&M Avramidis, Inc. (Jordan Avramidis) (Walpole, MA)	$155,706.
Stephen Pisarczyk (West Boylston, MA)	$116,548.

4. Should plaintiffs recover interest on the damages you found from the date of the termination of the STIP (December 31, 1999) until today?

YES ✓ **NO** ___

Please answer next Question 5 as to those plaintiffs for whom you answered YES to Questions 1 and 2. As to all others, go directly to Question 8.

Claim B. Violation of Petroleum Marketing Practices Act (PMPA) by Constructive Termination of Franchise

5. Did defendants' elimination of the rent subsidy program constitute a constructive termination of the franchises under PMPA of the following plaintiffs?

	YES	NO
Cynthia Karol (S. Attleboro, MA)	✓	___
John Sullivan (Scituate, MA)	✓	___
Akmal, Inc. (Akmal Moawed) (South Boston, MA)	✓	___
Sid Prashad (Worcester, MA)	✓	___
Mac's Shell Service (#1) (Francis Marcoux) (Southbridge, MA)	✓	___
Mac's Shell Service (#2) (Francis Marcoux) (Webster, MA)	✓	___
RAM Corp. (Richard Melanson) (Southbridge, MA)	✓	___
J&M Avramidis, Inc. (Jordan Avramidis) (Walpole, MA)	✓	___
Stephen Pisarczyk (West Boylston, MA)	✓	___

6. The damages for constructive termination of the franchise are the same damages as those for breach of the lease; namely, an amount equal to any subsidy not paid to a plaintiff from the date of termination of the STIP to the commencement of the Motiva lease plus any diminution in value of that plaintiff's business as a consequence of the termination of the STIP during that same period.

These damages are as follows:

Cynthia Karol (S. Attleboro, MA)	$119,547.
John Sullivan (Scituate, MA)	$123,271.
Akmal, Inc. (Akmal Moawed) (South Boston, MA)	$217,771.
Sid Prashad (Worcester, MA)	$102,838.
Mac's Shell Service (#1) (Francis Marcoux) (Southbridge, MA)	$158,564.
Mac's Shell Service (#2) (Francis Marcoux) (Webster, MA)	$186,582.
RAM Corp. (Richard Melanson) (Southbridge, MA)	$106,011.
J&M Avramidis, Inc. (Jordan Avramidis) (Walpole, MA)	$155,706.
Stephen Pisarczyk (West Boylston, MA)	$116,548.

7. Should plaintiffs recover interest on the damages you found from the date of the constructive termination of their franchise until today?

YES ✓ NO ___

Please answer next Question 8.

Claim C. Violation of the PMPA by Constructive Non-Renewal of the Franchises

8. Did the Motiva leases amount to constructive non-renewal of the following plaintiffs' leases?

	YES	NO
Cynthia Karol (S. Attleboro, MA)	✓	___
John Sullivan (Scituate, MA)	✓	___
Akmal, Inc. (Akmal Moawed) (South Boston, MA)	✓	___
Sid Prashad (Worcester, MA)	✓	___
Mac's Shell Service (#1) (Francis Marcoux) (Southbridge, MA)	✓	___
Mac's Shell Service (#2) (Francis Marcoux) (Webster, MA)	✓	___
RAM Corp. (Richard Melanson) (Southbridge, MA)	✓	___
J&M Avramidis, Inc. (Jordan Avramidis) (Walpole, MA)	✓	___
Stephen Pisarczyk (West Boylston, MA)	✓	___

If the answer as to any plaintiff is YES, as to that plaintiff please answer next Questions 9 and 10. If you

answered NO as to any plaintiff, please go directly to Question 11.

9. The damages for constructive non-renewal consist of two elements.

a. The amount of rent paid in excess of the industry standard.

b. The diminution of the value of plaintiff's business as a result of the excessive rent.

Cynthia Karol (S. Attleboro, MA)	$164,847.
John Sullivan (Scituate, MA)	$105,460.
Akmal, Inc. (Akmal Moawed) (South Boston, MA)	$44,573.
Sid Prashad (Worcester, MA)	$186,752.
Mac's Shell Service (#1) (Francis Marcoux) (Southbridge, MA)	$180,182.
Mac's Shell Service (#2) (Francis Marcoux) (Webster, MA)	$165,433.
RAM Corp. (Richard Melanson) (Southbridge, MA)	$53,644.
J&M Avramidis, Inc. (Jordan Avramidis) (Walpole, MA)	$168,510.
Stephen Pisarczyk (West Boylston, MA)	$96,991.

10. Should plaintiffs recover interest on these damages from the date the Motiva leases took effect until today?

YES ✓ **NO** ___

Please answer next Question 11.

Claim D. Violation of the Massachusetts Uniform Commercial Code (UCC).

11. Did defendants violate the UCC by setting the DTW (Dealer Tank Wagon) prices in bad faith by charging plaintiffs DTW prices that were not commercially reasonable?

	YES	NO
Cynthia Karol (S. Attleboro, MA)	✓	___
John Sullivan (Scituate, MA)	✓	___
Akmal, Inc. (Akmal Moawed) (South Boston, MA)	✓	___
Sid Prashad (Worcester, MA)	✓	___
Mac's Shell Service (#1) (Francis Marcoux) (Southbridge, MA)	✓	___
Mac's Shell Service (#2) (Francis Marcoux) (Webster, MA)	✓	___
RAM Corp. (Richard Melanson) (Southbridge, MA)	✓	___

J&M Avramidis, Inc. (Jordan Avramidis) (Walpole, MA)	✓	___
Stephen Pisarczyk (West Boylston, MA)	✓	___

If the answer as to any plaintiff is YES, as to that plaintiff please answer next Question 12.

12. The damages for overcharging is the total amount of the excess over the commercially reasonable amount paid by the following plaintiff you found were overcharged.

Cynthia Karol (S. Attleboro, MA)	$117,578.
John Sullivan (Scituate, MA)	$25,000.
Akmal, Inc. (Akmal Moawed) (South Boston, MA)	$42,264.
Sid Prashad (Worcester, MA)	$69,270.
Mac's Shell Service (#1) (Francis Marcoux) (Southbridge, MA)	$181,355.
Mac's Shell Service (#2) (Francis Marcoux) (Webster, MA)	$106,609.
RAM Corp. (Richard Melanson) (Southbridge, MA)	$135,940.
J&M Avramidis, Inc. (Jordan Avramidis) (Walpole, MA)	$98,824.

Stephen Pisarczyk $62,142.
(West Boylston, MA)

Please answer next Question 13.

Affirmative Defense. Releases.

13. Did Plaintiffs Sullivan and Ram Corporation validly release their claims against defendants?

Sullivan	**YES** ___	**NO** ✓
Ram Corporation	**YES** ___	**NO** ✓

[12/8/04] /s/
DATE FOREPERSON

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

MAC'S SHELL SERVICE, INC., et al., Plaintiffs, v. SHELL OIL COMPANY, INC., SHELL OIL PRODUCTS COMPANY LLC (f/k/a SHELL OIL PRODUCTS COMPANY), and MOTIVA ENTERPRISES, LLC Defendants.	C.A. No.: 01-CV-11300-RWZ

MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION FOR JUDGMENT AS A MATTER OF LAW OR, IN THE ALTERNATIVE, FOR A NEW TRIAL

Defendants Shell Oil Company, Shell Oil Products Company LLC and Motiva Enterprises, LLC (collectively, "defendants") respectfully submit this memorandum in support of their motion under Fed. R. Civ. P. 50 and 59 for judgment as a matter of law or, in the alternative, for a new trial.

* * * * *

III. DEFENDANTS ARE ENTITLED TO JUDGMENT AS A MATTER OF LAW OR, IN THE ALTERNATIVE, A NEW TRIAL AS TO PLAINTIFF'S CLAIM OF CONSTRUCTIVE TERMINATION.

A. Plaintiffs Failed to Establish That Their Franchises Were Constructively Terminated as a Result of the Termination of the Rent Subsidy Programs.

To establish a violation of the PMPA, a plaintiff has the initial burden of proving that there has been either a termination of the franchise or nonrenewal of the franchise relationship within the meaning of the Act. *See Chestnut Hill Gulf, Inc. v. Cumberland Farms, Inc.*, 940 F.2d 744, 748 (1st Cir. 1991). The case law is also clear that under the PMPA there are three elements or components of the franchise relationship—the right to occupy the premises, the right to receive branded fuel, and the right to use the franchisor's trademark—and unless there has been a nonrenewal or termination of one of these rights, there is no PMPA violation. Failure to satisfy that burden is fatal to a franchisee's action under the PMPA, since it is only the act of termination or nonrenewal of one of these elements which gives rise to a PMPA claim. *See Beachler v. Amoco Oil Co.*, 112 F.3d 902, 905 (7th Cir. 1997).

Numerous courts have concluded that the statute itself does not permit a claim for constructive termination but rather requires proof of an actual termination. *See, e.g., Jet, Inc. v. Shell Oil Co.*, No. 02-C-2289, 2002 U.S. Dist. LEXIS 22951, at *13-14 (N.D. Ill. Nov. 22, 2002) ("[t]he plain language of the statute contemplates an actual ending of the franchise relationship and therefore does not support a cause of action for constructive termination"), *aff'd*, 381 F.3d 627 (7th Cir. 2004); *Abrams Shell v. Shell Oil Co.*, 216 F. Supp. 2d 634, 641 (S.D. Tex. 2002) (holding that PMPA does not provide cause of action for constructive termination where plaintiffs did not allege

that defendants actually terminated any of the three elements of a franchise), *aff'd*, 343 F.3d 482 (5th Cir. 2003).

Other courts have not reached the issue of whether such a claim exists because they found that the plaintiffs' claims were based on the termination or breach of programs or provisions other than one of the three elements of the franchise relationship.[15] *See e.g. Majocka v. Getty Petroleum Corp.*, No. 89-2471-Z, 1991 U.S. Dist. LEXIS 5396, at *6-8 (D. Mass. 1991) (failure to perform in accordance with oral promises not incorporated into integrated franchise agreements could not form basis of claim for constructive termination under PMPA; parol evidence barred oral modification of contract, and therefore there could be no claim that defendant breached franchise agreement or that its conduct otherwise resulted in termination of plaintiff's franchise); *Moro v. Shell Oil Co.*, 91 F.3d 872, 875 (7th Cir. 1996) (holding termination of plaintiff's credit line could not amount to constructive termination of franchise because written dealer agreement did not require defendant to accept

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[15] The same is true here. Even assuming plaintiffs have proven that the leases were amended to require an ongoing rent subsidy and that this new provision was breached, there has never been any claim that Shell terminated plaintiffs' right to occupy the premises. At most, plaintiffs' claim is that the breach (the ending of the STIP programs) had such a devastating financial impact as to make it economically impossible to continue paying rent. The trial evidence is clear that this claim is factually untrue, and more importantly, it proves too much. If this type of allegation is deemed to state a claim under the PMPA, that would necessary open the doors wide to every claim by a dealer that some undesired action by the franchisor constructively terminated that dealer. The courts have repeatedly rejected efforts to turn breach of contract and other claims into federal PMPA claims. *See e.g. Dersch Energies, Inc. v. Shell Oil Co.*, 314 F.2d 846, 866 (7th Cir. 2002); *Abrams*, 216 F. Supp. 2d 634; *Majocka*, 1991 U.S. Dist. LEXIS 5396; *Moro*, 91 F.3d 872.

credit); *May-Som Gulf, Inc. v. Chevron, U.S.A., Inc.*, 869 F.2d 917, 925 (6th Cir. 1989) (holding elimination of certain dealer support services could not give rise to claim for constructive termination where "such arrangements are not part of a franchise under the PMPA and do not create rights under the PMPA"); *Clark v. BP Oil Co.*, 137 F.3d 386, 391-92 (6th Cir. 1998) (same).

As discussed in section II.A. above, neither oral statements regarding the duration of the rent subsidy programs nor Shell's course of conduct with respect to those programs could modify the terms of the lease agreements as to the stated rent in the contracts. For that reason, the rent subsidy programs were extra-contractual programs that did not constitute a component of the franchise relationship, and therefore elimination of the STIP rent subsidy programs as of December 31, 1999 could not constitute a constructive termination of plaintiffs' franchises.[16]

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[16] In addition, certain plaintiffs' testimony as to alleged oral promises was limited to the duration of the VRP *only*. For example, plaintiff Karol testified about one conversation with Territory Manager Dennis Nielsen, who purportedly told her that "the VRP would never be discontinued." (Karol Test., Day 2, p. 26). She further testified that she never again asked anyone from Shell after that single conversation whether the VRP would remain in place. *Id.* pp. 27-28. Similarly, plaintiff Marcoux testified only to conversations with Shell representatives who allegedly told him that the VRP "was intended to be a permanent program." (Marcoux Test., Day 5, pp. 86-88, Day 6, p. 9). Plaintiff Melanson testified only that his sales representative told him that "the variable rent program was here to stay." (Melanson Test., Day 6, pp. 47-49). Plaintiff Avramidis likewise testified only as to conversations in which Shell representatives allegedly told him that "the VRP would be there forever." (Avramidis Test., Day 7, p. 131). As to these plaintiffs, any claim of constructive termination necessarily arose when the VRP terminated on August 31, 1998, and thus they were required to commence their action on or before Au-

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B. No Reasonable Juror Could Have Found that Plaintiffs' Franchises Were "Constructively Terminated" by the Elimination of the STIP Subsidy.

The jury found that Shell constructively terminated the franchises of all eight plaintiffs by ending the STIP rent subsidy as of December 31, 1999, and requiring them to pay Contract Rent for the remainder of their existing leases. However, five plaintiffs—Mac's Shell, Cynthia Karol, Akmal, Inc., Sid Prashad, and J&M Avramidis—remained in operation through 2003 or beyond and manifestly did not suffer an impact from the termination of the STIP programs that was "so egregious as to amount to a termination of the franchise relationship." (*See* Jury Charge, Day 14, p. 100, lines 14-17.) Similarly, while plaintiffs Pisarczyk, Sullivan and Melanson sold their franchises, they did so for reasons independent of the change in rent and without suffering "egregious" harm from the elimination of the STIP programs. The evidence as to each plaintiff was as follows:

i. Mac's Shell. Mac's Shell's two stations paid Contract Rent from January 2000 through October 2001, when they entered into the new Motiva leases. The termination of the STIP subsidy programs resulted in an increase in the annual rent at Mac's Southbridge station of only $3109 (or 5%), from $61,784 in 1999 to $64,893 in 2000. (Pl. Ex. 804, attached to Defs. App.) In 2001, the rent decreased to $63,580, an overall increase of only $1,796 (or 2.9%) over the $61,784 it had paid in 1999. *Id.*

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gust 31, 1999 to satisfy the PMPA's one year statute of limitations. 15 U.S.C. § 2805. Their failure to commence this action until July 26, 2001 therefore bars their claims for constructive termination under the PMPA.

The same pattern occurred at Mac's Webster station. In 1999, under the STIP subsidy, plaintiff paid an annual rent of $100,003. (Pl. Ex. 805, attached to Defs. App.) In 2000, under a full year of Contract Rent, the rent was $103,636, or an increase of only $3633 (or 3.6%), *Id.* In 2001, when the rent changed from Contract Rent to the new Motiva rent on November 1, the rent was $96,482, or $3521 *less* than the subsidized STIP rent—an amount that almost completely offset the modest increase in rent during the prior year. *Id.* The net increase in rent for this station for the two years was $112.

By finding liability in favor of Mac's Shell on Claim B, the jury in effect concluded that having to pay an increased rent of $5,017 ($4,905 plus $112) for the two stations over two years—an average increase of $1,250 per station per year (or 1.5%)—had an impact "so egregious as to amount to a termination of the franchise relationship." Given that Mac's Shell had gross profits minus rent of $1,091,691 in 2000 and $1,147,966 in 2001[17] (Defs. Ex. 1511, attached to Defs. App.), there is no legally sufficient evidentiary basis on which a reasonable jury could base the conclusion that these *de minimis* rent increases amounted to a "constructive termination" of Mac's Shell's franchise.

ii. Cynthia Karol. The profitability of Ms. Karol's station increased after the elimination of the rent subsidy programs. While Ms. Karol's rent did go up from $59,447 in 1999 to $99,120 in 2000 when the STIP program ended (Pl. Ex. 800, attached to Defs. App.), this increase only

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[17] Gross profits minus rent more accurately measures the impact of rent on the profitability of the business because it looks not just at rent but also at revenues. In other words, one cannot determine whether a rent increase, even a significant one, threatens the viability of a dealer without also looking at revenues and profits.

lasted 13 months. In February 2001, she entered into a new Motiva lease, and her annual rent dropped to $66,371, or only $577 per month more than under the STIP programs. *Id.* More importantly, for purposes of assessing under Claim B whether the impact of the rent increase was so egregious as to cause a constructive termination of her franchise, the gross profits minus rent for her station increased from $299,218 in 1999 to $332,990 in 2000 and to an average of over $350,000 per year for the period 2000 through 2003. (Defs. Ex. 1541, attached to Defs. App.) Because the evidence established that Ms. Karol's gross profits increased even after taking into account her higher rent payments, there is no factual basis to conclude she could not afford to remain at the premises or that her franchise was constructively terminated.

iii. Akmal, Inc. Akmal, Inc.'s gross profits minus rent also went up substantially after the end of the STIP program, despite an increase in rent. In 1999, the last year of the STIP program, Akmal's gross profits minus rent were $188,366, but averaged over $235,000 annually from 2000 through 2003. (Defs. Ex. 1509, attached to Defs. App.) This evidence does not provide a legally sufficient basis to support a finding of constructive termination.

iv. RAM Corporation. RAM Corporation sold its franchise to another lessee-dealer in 2001 for $125,000. Although RAM's rent increased following the elimination of the STIP subsidy from $69,734 in 1999 to $92,713 in 2000 (Pl. Ex. 812, attached to Defs. App.), its net income simultaneously doubled from $28,022 in 1999 to $56,989 in 2000 and increased again to $63,372 from January through September 2001.[18] (*See* Defs. Ex. 1518, attached

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[18] This amount excludes the $125,000 sales price of the franchise.

to Defs. App.) Its gross profits minus rent increased from $324,408 in 1999 to $341,782 in 2000 under the full Contract Rent. (Defs. Ex. 1519) As RAM's president Richard Melanson acknowledged at trial, at the time he sold the franchise in 2001 the station "looked pretty good profit-wise." (Melanson Test., Day 7, p. 44, line 16.) No reasonable jury could conclude that this evidence established a constructive termination.[19]

v. Stephen Pisarczyk. The trial record also does not support the conclusion that Stephen Pisarczyk's franchise was constructively terminated because of the elimination of the STIP subsidy. Mr. Pisarczyk testified that he had wanted to purchase his station at 114 West Boylston Street "from day one when I first received the lease there." (Day 9, p. 57, lines 20- 23). His goal was realized when his son purchased the station from Motiva in the summer of 2000 (*id.*, p. 58, lines 9-15). Mr. Pisarczyk never even suggested during his testimony that his actions were influenced in any way by the elimination of the rent subsidy.

vi. Sid Prashad. Sid Prashad's subsidized STIP rent ended on December 31, 1999. He paid Contract Rent for only seven months from January 1 until August 1, 2000, when he entered into a new Motiva lease. Although his Contract Rent was higher than his rent under the STIP program, his gross profits minus rent also increased in 2000. Mr. Prashad's gross profits minus rent in 2000, the one year he was subject to Contract Rent, were $94,286,

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[19] The fact that plaintiffs' gross profits minus rent went up despite the increase in their rents validates Shell's conclusion that its previous subsidized rents were well below market level. *See* Testimony of Michael Hanley, Day. 12, p. 5, lines 7-11 (noting that under the VRP, "Shell had very low actual net rents, very low, much below the industry.")

compared to $71,031 in 1999, when the STIP programs were in effect. (Defs. Ex. 1550, attached to Defs. App.) This evidence does not provide a legally sufficient basis to support a finding of constructive termination.

vii. John Sullivan. Plaintiff Sullivan's income increased after the elimination of the rent subsidy. He paid Contract Rent for only five months, from January through May, 2000. He sold his franchise in October, 2000, after he had begun to pay rent under the new Motiva leases. His net income was negative $17,626 in 1999 when he was subject to the STIP subsidy; it increased to a positive $2,434 in 2000, when he paid Contract Rent for five months of the year and rent under the new Motiva lease for four months until he sold his franchise in October 2000. (Defs. Ex. 1554, attached to Defs. App.) No reasonable juror could conclude that having to pay an increased rent for only five months during a year in which net income went up by $20,000 caused such egregious harm as to establish a constructive termination of Mr. Sullivan's franchise relationship.

viii. J&M Avramidis. Plaintiff J&M Avramidis paid Contract Rent from January, 2000 until April 1, 2002. Its rent increased only moderately by 15% when it transitioned from STIP rent to Contract Rent (from $47,772 in 1999 to $55,701 in 2000), and by another 10% (to $61,248) in 2001. (Pl. Ex. 817, attached to Defs. App.) During this same time, the compensation of the four officers (Jordan Avramidis, his brother, and each of their wives) increased from $62,400 in 1999, to $63,600 in 2000, and went back to $62,400 in 2001. (Defs. Ex. 1520, attached to Defs. App.) While gross profits minus rent declined from $109,379 in 1999 to $105,789 in 2000, and to $88,479 in 2001, this decline was part of a steady trend that began in 1996 when the VRP was in effect. (Defs.

Ex. 1521, attached to Defs. App.) Against this backdrop of deteriorating profitability that began in 1996, continued for three more years while the subsidy programs were in effect, and continued for the 15 months of Contract Rent and thereafter, the relatively modest rent increases during the Contract Rent period were not so extreme as to result in a constructive termination.

Plaintiffs' constructive termination claim necessarily is limited to the period each plaintiff was charged Contract Rent. Their theory appears to be that they can establish constructive termination if they experienced any economic harm whatsoever, which, of course, most of them did in the sense that their rent expense went up. Plaintiffs' theory proves too much, however, because dealers' expenses (for rent, labor, convenience store items, etc.) are almost always going up, and not every increase can establish a PMPA violation. Under the Court's charge, the amount and duration of the additional expense, measured separately for each plaintiff, must have had an impact so egregious as to be the equivalent of a termination; that is, a situation in which the plaintiff could no longer economically afford to remain at the premises. Based on the financial evidence presented for each plaintiff, no reasonable juror could have concluded that the additional rent expense had such an effect as to any plaintiff. Five of the plaintiffs remained in operation throughout the damages period (December 2003) so they could not have been constructively terminated in 2000 or 2001. None of the other three plaintiffs (RAM, Sullivan, and Pisarczyk) who decided to sell their franchises had rent increases that were so egregious as to be the equivalent of a termination. Although judgment as a matter of law is the appropriate remedy, a new trial is necessary at a minimum

because the jury's verdict is so contrary to the substantial weight of the evidence.

* * * * *

IV. DEFENDANTS ARE ENTITLED TO JUDGMENT AS A MATTER OF LAW OR, IN THE ALTERNATIVE, A NEW TRIAL AS TO PLAINTIFFS' CLAIM OF CONSTRUCTION NONRENEWAL.

A. The PMPA Does Not Permit a Claim for Constructive Nonrenewal.

The remedial scheme of the PMPA is designed to balance the need to protect independent service station franchisees from arbitrary nonrenewal with the need to maintain franchisors' ability to exercise their business judgment and modify their franchise agreements without undue interference from the courts. *See Chestnut Hill Gulf, Inc. v. Cumberland Farms, Inc.*, 940 F.2d 744, 747 (1st Cir. 1991) (observing that Congress intended PMPA to balance protection of franchisees with needs of franchisors to respond to changing market conditions); *May-Som Gulf, Inc. v. Chevron U.S.A., Inc.*, 869 F.2d 917, 921 (6th Cir. 1989) (acknowledging franchisors' need to adapt economically "in an age of increasing corporate competition").

The PMPA does not require perpetuation of any specific written agreement, but only regulates nonrenewal of the parties' "franchise relationship." *Halder v. Standard Oil Co.*, 642 F.2d 107, 111 (5th Cir. 1981). Thus, it is not a violation of the PMPA for the franchisor to change the rent or other terms of the lease, or even to increase the rent 200% or more. *See Ackley v. Gulf Oil Corp.*, 726 F. Supp. 353, 367-69 (D. Conn.) (objective rental formula applied uniformly to all franchisees did not violate PMPA even though franchisee rents increased up to 167%),

aff'd, 889 F.2d 1280 (2d Cir. 1989); *Munno v. Amoco Oil Co.*, 488 F. Supp. 1114, 1117, 1121 (D. Conn. 1980) (no violation of PMPA where decision to change leases was made in good faith, even when it resulted in rent increase of 200-300%).

To equalize the parties' bargaining power at the time of renewal, Congress created a mandatory notify-and-wait procedure before a franchisor may nonrenew a franchise relationship. 15 U.S.C. §§ 2802(a), 2804. If the franchisor and franchisee are unable to agree on renewal terms, the franchisor must issue a formal, written notice of nonrenewal. 15 U.S.C. § 2802(b)(1)(a). This triggers a 90-day waiting period during which the existing relationship is preserved, and during which the franchisee may seek a preliminary injunction under a relaxed standard to maintain the status quo while the parties litigate the franchisor's proposed renewal terms. *Id.* §§ 2804(a)(2), 2805(b).

This precise statutory structure guarantees franchisees a three-month period in which to consider the proposed new terms and either challenge them or accept them. The statute requires franchisees to make a clear choice between accepting proposed renewal terms or rejecting and litigating them, and courts cannot simply overlook a franchisee's failure to follow these statutory requirements. "It was Congress's choice to force dealers to face such a . . . [decision] in order to trigger the protections of the PMPA. And it is up to Congress, not this court, to decide when a dealer may invoke the protections of this statutory scheme." *Clark v. BP Oil Co.*, 137 F.3d 386, 394-95 (6th Cir. 1998) (refusing to recognize a cause of action for "anticipatory nonrenewal" that is not expressly provided in the PMPA).

Here, however, plaintiffs actually signed the renewal agreements proposed by Motiva, which included the new rental amounts. Because they chose to sign the new agreements, none of the plaintiffs triggered the statutory procedure for the issuance of a formal notice of nonrenewal, after which they could have sought a preliminary injunction within the 90-day waiting period as prescribed by the PMPA.[20] As the Seventh Circuit has held, where a franchisee signs a renewal agreement rather than allowing a notice of termination to issue, the franchisee has "divested itself of the right to bring an action under the PMPA." *Dersch Energies, Inc. v. Shell Oil Co.*, 314 F.3d 846, 866 (7th Cir. 2002) (noting that unless it triggers statutory notification mechanism, a franchisee cannot transform "a mere contract dispute into a non-renewal" claim.) Accordingly, defendants are entitled to judgment as a matter of law on this claim.

* * * * *

[Dated: February 28, 2005]

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[20] Plaintiffs may argue that filing this lawsuit is the same thing as refusing to sign the renewal agreement. First of all, plaintiffs Karol, Sullivan, Prashad and RAM Corporation all had sold their stations or signed the new Motiva leases before this lawsuit was filed in July 2001. Second, as to all plaintiffs, their failure to either challenge or sign has led to increased damages exposure to defendants. If plaintiffs had refused to sign, there would be no basis for Motiva to charge the new rents. But because plaintiffs did sign, they were charged the new rents on which they are now basing their damage claims. The PMPA expressly prohibits a franchisee from having it both ways—signing (paying the new rents) and challenging (seeking damages on the new rents), as plaintiffs are doing here.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 01-11300-RWZ

FRANCIS MARCOUX, ET AL.,

v.

SHELL OIL PRODUCTS CO., INC.
AND MOTIVA ENTERPRISES, LLC

ORDER ON TRIAL AND POST-TRIAL MOTIONS

September 19, 2005

ZOBEL, D.J.

Sixty Shell Oil dealers brought this action for breach of contract and violations of the Petroleum Marketing Practices Act ("PMPA"). Because the individual claims are, for the most part, unique, the case is not amenable to class action treatment. The Court did, however, order an initial trial of the claims of ten plaintiffs which was held from November 15 to December 8, 2004 and resulted in a verdict for those plaintiffs.[1]

Plaintiff's motion for limited reconsideration of the entry of summary [judgment] against plaintiff Stephen Pisarczyk (#296 on the docket)

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[1] Sixty plaintiffs filed suit. Eighteen voluntarily dismissed their claims in 2002. From the remainder, the Court randomly selected ten for the first trial. One settled on the eve of trial, and the other nine tried to verdict.

The motion was denied.

Defendants' motion for reconsideration of the decision on their motion for summary judgment (#297 on the docket)

The motion was denied.

Defendants' motion in limine regarding damages evidence (#298 on the docket)

The motion is denied as moot.

Defendants' motion in limine to exclude the proposed expert testimony of Brian Gorin (#299 on the docket)

The motion was denied.

Defendants' motion in limine regarding evidence relating to defendants' pricing to non-lessee dealers (#302 on the docket)

The motion is denied as moot.

Plaintiffs' motion for special verdict (#314 on the docket)

The motion was allowed.

Defendants' motion for judgment as a matter of law (#322 on the docket)

The Court reserved on the motion and will revisit it in connection with its renewal #352.

Defendants' supplemental motion for special verdict (#329 on the docket)

The motion was denied as to the form of defendants' proposal, although the Court submitted special questions to the jury.

Defendants' motion for special verdict (#350 on the docket)

The motion was allowed.

Defendants' motion for jury instructions (#351 on the docket)

The motion was allowed in part and denied in part.

Both parties also filed a number of post-trial motions and proposed findings and rulings addressed below.

Plaintiffs' motion for a permanent injunction (#341 on the docket)

The motion is denied. Neither the PMPA nor the record in this case support the requested recalculation of rent.

Plaintiffs' motion for an award of punitive damages for willfulness under the PMPA (#342 on the docket)

The motion is denied. Although the jury found constructive termination and constructive non-renewal of certain lease agreements, I am not convinced that defendants acted in willful disregard of the PMPA and that punitive damages are appropriate. The evidence showed at least two reasons for defendants' conduct that mitigate against the imposition of exemplary damages.

First, the entire industry was changing the manner of computing rent. Whereas Shell and some others had based the amount of rent on the amount of gas purchased, the industry and defendants switched to a formulation based on the value of the station's real estate. That decision followed a change in the use of gas stations from simply selling gasoline and oil to including also convenience stores and other amenities. It also reflected a reasonable business decision to improve defendants' return on their investment in the real estate.

Second, during the period in question, Shell had merged with Texaco, and the combined company had to evolve a uniform rent structure. These business realities were, at least, partially responsible for the rent program

of which plaintiff[s] complained, and they compel denial of any award of punitive damages.

Plaintiffs' proposed findings of fact and rulings of law on Count III (#343 on the docket)

In order to establish a violation of Mass. Gen. Laws ch. 93A, § 11, plaintiffs "must show that the defendant[s'] actions fell 'within at least the penumbra of some common-law, statutory, or other established concept of unfairness,' or were 'immoral, unethical, oppressive or unscrupulous' . . ." *Damon v. Sun Co., Inc.*, 87 F.3d 1467, 1484 (1st Cir. 1996). For the same reasons that defendants are not liable for willful disregard and punitive damages under the PMPA, I find the defendants not liable on Count III.

Defendants' motion for judgment as a matter of law, or, in the alternative, for a new trial (#352 on the docket)

Defendants again raise a number of legal issues concerning the viability of plaintiffs' claims. I have previously addressed them in the context of a motion for summary judgment, rulings on evidence and defendants' motions during trial under Rule 50. I adhere to those rulings.

Defendants' arguments that the verdict is not supported by the evidence ignores the jury's right to draw conclusions from the evidence different from the conclusions the parties might reach. The jury is not required to accept calculations by the parties' experts. It may make its own calculations based on the evidence even if they lead to a result different from that reached by the expert. The evidence in this case permitted the jury's findings both as to liability and damages.

Defendants complain that they were not allowed sufficient time to present their case. First, the Court explained to all counsel before the case began the strictures on time, namely, that there would be fourteen trial days. Second, while it is true that plaintiffs used more time than allotted, a not insignificant part of the excess was attributable to lengthy cross-examination by defendants.

Defendants' motion for judgment as a matter of law is denied as is the alternative, their motion for a new trial.

Defendant's motion for leave to file memorandum in excess of 20 pages (#353 on the docket)

The motion is allowed.

Plaintiffs' motion for leave to file reply (#354 on the docket)

The motion is allowed.

Plaintiffs' motion to file brief in excess of twenty pages (#361 on the docket)

The motion is allowed.

Defendants' motion for leave to file a reply (#365 on the docket)

The motion is allowed.

_____
DATE

/s/ Rya W. Zobel
RYA W. ZOBEL
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 01-11300-RWZ

MAC'S SHELL SERVICE, INC., JOHN A. SULLIVAN, RAM CORPORATION, INC., STEPHEN PISARCZYK, CYNTHIA KAROL, J&M AVRAMIDIS, INC., SID PRASHAD, THREE K'S, INC. AND AKMAL, INC.,

Plaintiffs,

v.

SHELL OIL COMPANY, INC., SHELL OIL PRODUCTS COMPANY, LLC (F/K/A SHELL OIL PRODUCTS COMPANY), AND MOTIVA ENTERPRISES, LLC

Defendants.

JUDGMENT

October 27, 2006

Based upon (i) the Jury's Special Verdict dated December 8, 2004, (ii) the September 19, 2005 Order on Trial and Post-Trial Motions, (iii) the Joint Motion for Entry of Separate Judgment Pursuant to Fed. R. Civ. P. 54(b) dated January 24, 2006, and (iv) the August 31, 2006 Memorandum of Decision, **IT IS HEREBY ORDERED, ADJUDGED, AND DECREED as follows:**

1. With respect to the claims asserted by Plaintiffs, John A. Sullivan, RAM Corporation, Inc., Stephen Pisarczyk, Cynthia Karol, Mac's Shell Service, Inc., J&M Avramidis, Inc., Sid Prashad, Three K's, Inc. and Akmal,

Inc., and for the reasons set forth in the parties' Joint Motion for Entry of Separate Judgment Pursuant to Fed. R. Civ. P. 54(b), it is this Court's determination that there is "no just reason for delay" in entering judgment. Accordingly, judgment shall enter as set forth below.

2. Judgment in favor of Plaintiff **John A. Sullivan** against Defendants, Shell Oil Company, Shell Oil Products Company, and Motiva Enterprises LLC, jointly and severally, on Counts II, V, and VI as follows:

(i) As to Count II (Violation of the PMPA based on Constructive Termination of the franchise relationship), Judgment as follows: (1) damages for loss of the STIP subsidy in the amount of $23,271.00; (2) based on the evidence presented by plaintiffs' expert, these lost subsidy amounts averaged $4,654.20 a month, began on January 1, 2000 and ended on June 1, 2000 when plaintiff entered into a Motiva lease; prejudgment interest is awarded on these amounts at the annual rate of 3.08% and shall run from the date each payment would have been made to the date of entry of judgment; and (3) additional damages in the amount of $100,000.00, with prejudgment interest at an annual rate of 2.75% from December 31, 2003 to the date of entry of judgment.[1]

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[1] The interest rates applied to damages for loss of the STIP subsidy (3.08%), excess rent (2.85%), lost business value (2.75%), and the additional unspecified damage awards (2.75%) are those identified in Defendants' Memorandum of Law Regarding Rate of Prejudgment Interest on PMPA Claims dated January 24, 2006. Defendants calculated what the damages and prejudgment interest amounts were as of January 1, 2006 for the Constructive Termination, Constructive Non-Renewal and Breach of Lease claims, respectively, and set those calculations forth in Exhibit B to the Joint Motion For Entry

(ii) As to Count II (Violation of the PMPA based on Constructive Non-Renewal of the franchise relationship), Judgment as follows: (1) damages for excess rent in the amount of $5,460.00; (2) based on the evidence presented by plaintiffs' expert, the excess rent payments were $1,365 a month, began on June 1, 2000, and ended September 30, 2000 when plaintiff sold his station; prejudgment interest is awarded on these amounts at an annual rate of 2.85% and shall run from the date of each overcharge to the date of entry of judgment; and (3) additional damages in the amount of $100,000.00, with prejudgment interest at an annual rate of 2.75% from December 31, 2003 to the date of entry of judgment.

(iii) As to Count V (Breach of the Lease), Judgment as follows: (1) damages for loss of the STIP subsidy in the amount of $23,271.00; (2) based on the evidence presented by plaintiffs' expert, these lost subsidy amounts averaged $4,654.20 a month, began on January 1, 2000 and ended on June 1, 2000 when plaintiff entered a Motiva lease; prejudgment interest is awarded on these amounts at an annual rate of 12% and shall run from the date each payment would have been made to the date of entry of judgment; and (3) additional damages in the amount of $100,000.00, with prejudgment interest at an annual rate of 12% from December 31, 2003 to the date of entry of judgment.

(iv) As to Count VI (Breach of the Supply Contract–Open Price Term), Judgment in the amount of $25,000.00, with prejudgment interest at an annual

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of Separate Judgment Pursuant to Fed. R. Civ. P. 54(b) filed by the parties on January 24, 2006.

rate of 12% from December 31, 2003 to the date of entry of judgment.

(v) Because plaintiff's claims under Count II (Violation of the PMPA based on Constructive Termination of the franchise relationship) and under Count V (Breach of the Lease) sought the same damages for loss of the STIP subsidy and lost business value and the jury awarded the same damages, plaintiff is entitled to recover as to those two awards only once. Because the prejudgment interest rate is different for the two Counts, plaintiff shall be awarded the higher damage award.

3. Judgment in favor of Plaintiff **RAM Corporation, Inc.** against Defendants, Shell Oil Company, Shell Oil Products Company, and Motiva Enterprises LLC, jointly and severally, on Counts II, V, and VI as follows:

(i) As to Count II (Violation of the PMPA based on Constructive Termination of the franchise relationship), Judgment as follows: (1) damages for loss of the STIP subsidy in the amount of $66,011.00; (2) based on the evidence presented by plaintiffs' expert, these lost subsidy amounts began on January 1, 2000, averaged $3,103.75 a month during that year, averaged $5,753.20 from January, 2001 through May 31, 2001, and ended on June 1, 2001 when plaintiff entered into a Motiva lease; prejudgment interest is awarded on these amounts at an annual rate of 3.08% and shall run from the date each payment would have been made to the date of entry of judgment; and (3) additional damages in the amount of $40,000.00, with prejudgment interest at an annual rate of 2.75% from December 31, 2003 to the date of entry of judgment.

(ii) As to Count II (Violation of the PMPA based on Constructive Non-Renewal of the franchise relationship), Judgment as follows: (1) damages for excess rent in the amount of $13,644.00; (2) based on the evidence presented by plaintiffs' expert, the excess rent payments began on June 1, 2001, were $3,411.00 a month from that date through September 30, 2001 when plaintiff sold his station; prejudgment interest is awarded on these amounts at an annual rate of 2.85% and shall run from the date of each overcharge to the date of entry of judgment; and (3) additional damages in the amount of $40,000.00, with prejudgment interest at an annual rate of 2.75% from December 31, 2003 to the date of entry of judgment.

(iii) As to Count V (Breach of the Lease), Judgment as follows: (1) damages for loss of the STIP subsidy in the amount of $66,011.00; (2) based on the evidence presented by plaintiffs' expert, these lost subsidy amounts began on January 1, 2000, averaged $3,103.75 a month during that year, averaged $5,753.20 from January, 2001 through May 31, 2001, and ended on June 1, 2001 when plaintiff entered into a Motiva lease; prejudgment interest is awarded on these amounts at an annual rate of 12% and shall run from the date each payment would have been made to the date of entry of judgment; and (3) additional damages in the amount of $40,000.00, with prejudgment interest at an annual rate of 12% from December 31, 2003 to the date of entry of judgment.

(iv) As to Count VI (Breach of the Supply Contract–Open Price Term), Judgment in the amount of $135,940.00 with prejudgment interest at an annu-

al rate of 12% from December 31, 2003 to the date of entry of judgment.

(v) Because plaintiff's claims under Count II (Violation of the PMPA based on Constructive Termination of the franchise relationship) and under Count V (Breach of the Lease) sought the same damages for loss of the STIP subsidy and lost business value and the jury awarded the same damages, plaintiff is entitled to recover as to those two awards only once. Because the prejudgment interest rate is different for the two Counts, plaintiff shall be awarded the higher damage award.

4. Judgment in favor of Plaintiff **Stephen Pisarczyk** against Defendants, Shell Oil Company, Shell Oil Products Company, and Motiva Enterprises LLC, jointly and severally, on Counts II, V, and VI as follows:

(i) As to Count II (Violation of the PMPA based on Constructive Termination of the franchise relationship), Judgment as follows: (1) damages for loss of the STIP subsidy in the amount of $19,557.00; (2) based on the evidence presented by plaintiffs' expert, these lost subsidy amounts began on January 1, 2000, averaged $2,793.00 a month, and ended on August 1, 2000; prejudgment interest is awarded on the amounts at an annual rate of 3.08% and shall run from the date each payment would have been made to the date of entry of judgment; (3) damages at an annual rate of 2.75% from December 31, 2003 to the date of entry of judgment; and (4) additional damages in the amount of $50,000.00, with prejudgment interest at an annual rate of 2.75% from December 31, 2003 to the date of entry of judgment.

(ii) As to Count II (Violation of the PMPA based on Constructive Non-Renewal of the franchise relationship), Judgment as follows: (1) damages for lost business value in the amount of $46,991.00 and additional damages in the amount of $50,000; and (2) prejudgment interest on the $96,991.00 shall be at an annual rate of 2.75% from December 31, 2003 to the date of entry of judgment.

(iii) As to Count V (Breach of the Lease), Judgment as follows: (1) damages for loss of the STIP subsidy in the amount of $19,557.00; (2) based on the evidence presented by plaintiffs' expert, these lost subsidy amounts began on January 1, 2000, averaged $2,793.00 a month, and ended on August 1, 2000; prejudgment interest is awarded on these amounts at an annual rate of 12% and shall run from the date each payment would have been made to the date of entry of judgment; (3) damages for lost business value in the amount of $46,991.00, with prejudgment interest at an annual rate of 12% from December 31, 2003 to the date of entry of judgment; and (4) additional damages in the amount of $50,000.00, with prejudgment interest at an annual rate of 12% from December 31, 2003 to the date of entry of judgment.

(iv) As to Count VI (Breach of the Supply Contract–Open Price Term), Judgment in the amount of $62,142.00, with prejudgment interest at an annual rate of 12% from December 31, 2003 to the date of entry of judgment.

(v) Because plaintiff's claim under Count II (Violation of the PMPA based on Constructive Termination of the franchise relationship) and under Count V (Breach of the Lease) sought the same damages

for loss of the STIP subsidy and lost business value and the jury awarded the same damages, plaintiff is entitled to recover as to those two awards only once. Because the prejudgment interest rate is different for the two Counts, plaintiff shall be awarded the higher damage award.

5. Judgment in favor of Plaintiff **Cynthia Karol** against Defendants, Shell Oil Company, Shell Oil Products Company, and Motiva Enterprises LLC, jointly and severally, on Counts II, V, and VI as follows:

(i) As to Count II (Violation of the PMPA based on Constructive Termination of the franchise relationship), Judgment as follows: (1) damages for loss of the STIP subsidy in the amount of $41,257.00; (2) based on the evidence presented by plaintiffs' expert, these lost subsidy amounts began on January 1, 2000, averaged $3,380.42 a month during that year, were $692.00 in January, 2001, and ended on February 1, 2001 when plaintiff entered into a Motiva lease; prejudgment interest is awarded on these amounts at an annual rate of 3.08% and shall run from the date each payment would have been made to the date of entry of judgment; and (3) damages for lost business value in the amount of $78,290.00, with prejudgment interest at an annual rate of 2.75% from December 31, 2003 to the date of entry of judgment.

(ii) As to Count II (Violation of the PMPA based on Constructive Non-Renewal of the franchise relationship), Judgment as follows: (1) damages for excess rent in the amount of $86,557.00; (2) based on the evidence presented by plaintiffs' expert, the excess rent payments began on February 1, 2001,

were $2,249.00 a month from that date through January 31, 2002, were $2,479.00 a month from February 1, 2002 th[r]ough January 31, 2003, and were $2,711 a month from February 1, 2003 th[r]ough December 31, 2003; prejudgment interest is awarded on these amounts at an annual rate of 2.85% and shall run from the date of each overcharge to the date of entry of judgment; and (3) damages for lost business value in the amount of $78,290.00, with prejudgment interest at an annual rate of 2.75% from December 31, 2003 to the date of entry of judgment.

(iii) As to Count V (Breach of Lease), Judgment as follows: (1) damages for loss of the STIP subsidy in the amount of $41,257.00; (2) based on the evidence presented by plaintiffs' expert, these lost subsidy amounts began on January 1, 2000, averaged $3,380.42 a month during that year, were $692.00 in January, 2001, and ended on February 1, 2001 when plaintiff entered into a Motiva lease; prejudgment interest is awarded on these amounts at an annual rate of 12% and shall run from the date each payment would have been made to the date of entry of judgment; and (3) damages for lost business value in the amount of $78,290.00, with interest at an annual rate of 12% from December 31, 2003 to the date of entry of judgment.

(iv) As to Count VI (Breach of the Supply Contract–Open Price Term), Judgment in the amount of $117,578.00, with prejudgment interest at an annual rate of 12% from December 31, 2003 to the date of entry of judgment.

(v) Because plaintiff's claims under Count II (Violation of the PMPA based on Constructive Termination of the franchise relationship) and under Count V (Breach of the Lease) sought the same damages for loss of the STIP subsidy and lost business value and the jury awarded the same damages, plaintiff is entitled to recover as to those two awards only once. Because the prejudgment interest rate is different for the two Counts, plaintiff shall be awarded the higher damage award.

6. Judgment in favor of Plaintiff **Mac's Shell Service, Inc., Southbridge Shell**, against Defendants, Shell Oil Company, Shell Oil Products Company, and Motiva Enterprises LLC, jointly and severally, on Counts II, V, and VI as follows:

(i) As to Count II (Violation of the PMPA based on Constructive Termination of the franchise relationship), Judgment as follows: (1) damages for loss of the STIP subsidy in the amount of $58,602.00; (2) based on the evidence presented by plaintiffs' expert, these lost subsidy amounts began on January 1, 2000, averaged $2,919.25 a month during that year, averaged $2,357.10 a month from January 1, 2001 through October 31, 2001, and ended on November 1, 2001 when plaintiff entered into a Motiva lease; prejudgment interest is awarded on these amounts at an annual rate of 3.08% and shall run from the date each payment would have been made to the date of entry of judgment; and (3) damages for lost business value in the amount of $99,962.00, with prejudgment interest at an annual rate of 2.75% from December 31, 2003 to the date of entry of judgment.

(ii) As to Count II (Violation of the PMPA based on Constructive Non-Renewal of the franchise relationship), Judgment as follows: (1) damages for excess rent in the amount of $80,220.00; (2) based on the evidence present by plaintiffs' expert, the excess rent payments began on November 1, 2001, were $2,950.00 a month from that date through October 31, 2002, were $3,170.00 a month from November 1, 2002 th[r]ough October 31, 2003, and were $3,389.00 a month from November 1, 2003 th[r]ough December 31, 2003; prejudgment interest is awarded on these amounts at an annual rate of 2.85% and shall run from the date of each overcharge to the date of entry of judgment; and (3) damages for lost business value in the amount of $99,962.00, with prejudgment interest at an annual rate of 2.75% from December 31, 2003 to the date of entry of judgment.

(iii) As to Count V (Breach of the Lease), Judgment as follows: (1) damages for loss of the STIP subsidy in the amount of $58,602.00; (2) based on the evidence presented by plaintiffs' expert, these lost subsidy amounts began on January 1, 2000, averaged $2,919.25 a month during that year, averaged $2,357.10 a month from January 1, 2001 through October 31, 2001, and ended on November 1, 2001 when plaintiff entered into a Motiva lease; prejudgment interest is awarded on these amounts at an annual rate of 12% and shall run from the date each payment would have been made to the date of entry of judgment; and (3) damages for lost business value in the amount of $99,962.00, with prejudgment interest at an annual rate of 12% from December 31, 2003 to the date of entry of judgment.

(iv) As to Count VI (Breach of the Supply Contract–Open Price Term), Judgment in the amount of $181,355.00, with prejudgment interest at an annual rate of 12% from December 31, 2003 to the date of entry of judgment.

(v) Because plaintiff's claims under Count II (Violation of the PMPA based on Constructive Termination of the franchise relationship) and under Count V (Breach of the Lease) sought the same damages for loss of the STIP subsidy and lost business value and the jury awarded the same damages, plaintiff is entitled to recover as to those two awards only once. Because the prejudgment interest rate is different for the two Counts, plaintiff shall be awarded the higher damages award.

7. Judgment in favor of Plaintiff **Mac's Shell Service, Inc., Webster Shell**, against Defendants, Shell Oil Company, Shell Oil Products Company, and Motiva Enterprises LLC, jointly and severally, on Counts II, V, and VI as follows:

(i) As to Count II (Violation of the PMPA based on Constructive Termination of the franchise relationship), Judgment as follows: (1) damages for loss of the STIP subsidy in the amount of $89,335.00; (2) based on the evidence presented by plaintiffs' expert, these lost subsidy amounts began on January 1, 2000, averaged $3,885.50 a month during that year, averaged $4,270.90 a month from January 1, 2001 through October 31, 2001, and ended on November 1, 2001 when plaintiff entered into a Motiva lease; prejudgment interest is awarded on these amounts at an annual rate of 3.08% and shall run from the date each

payment would have been made to the date of entry of judgment; and (3) damages for lost business value in the amount of $97,247.00, with prejudgment interest at an annual rate of 2.75% from December 31, 2003 to the date of entry of judgment.

(ii) As to Count II (Violation of the PMPA based on Constructive Non-Renewal of the franchise relationship), Judgment as follows: (1) damages for excess rent in the amount of $68,186.00; (2) based on the evidence presented by plaintiffs' expert, the excess rent payments began on November 1, 2001, were $2,425.00 a month from that date through October 31, 2002, were $2,746.00 a month from November 1, 2002 th[r]ough October 31, 2003, and were $3,067.00 a month from November 1, 2003 th[r]ough December 31, 2003; prejudgment interest is awarded on these amounts at an annual rate of 2.85% and shall run from the date of each overcharge to the date of entry of judgment; and (3) damages for lost business value in the amount of $97,247.00 with prejudgment interest at an annual rate of 2.75% from December 31, 2003 to the date of entry of judgment.

(iii) As to Count V (Breach of the Lease), Judgment as follows: (1) damages for loss of the STIP subsidy in the amount of $89,335.00; (2) based on the evidence presented by plaintiffs' expert, these lost subsidy amounts began on January 1, 2000, averaged $3,885.50 a month during that year, averaged $4,270.90 a month from January 1, 2001 through October 31, 2001, and ended on November 1, 2001 when plaintiff entered into a Motiva lease; prejudgment interest is awarded on these amounts at

an annual rate of 12% and shall run from the date each payment would have been made to the date of entry of judgment; and (3) damages for lost business value in the amount of $97,247.00, with prejudgment interest at an annual rate of 12% from December 31, 2003 to the date of entry of judgment.

(iv) As to Count VI (Breach of the Supply Contract–Open Price Term), Judgment in the amount of $106,609.00, with prejudgment interest at an annual rate of 12% from December 31, 2003 to the date of entry of judgment.

(v) Because plaintiff's claims under Count II (Violation of the PMPA based on Constructive Termination of the franchise relationship) and under Count V (Breach of the Lease) sought the same damages for loss of the STIP subsidy and lost business value and the jury awarded the same damages, plaintiff is entitled to recover as to those two awards only once. Because the prejudgment interest rate is different for the two Counts, plaintiff shall be awarded the higher damage award.

8. Judgment in favor of Plaintiff **J&M Avramidis, Inc.** against Defendants, Shell Oil Company, Shell Oil Products Company, and Motiva Enterprises LLC, jointly and severally, on Counts II, V, and VI as follows:

(i) As to Count II (Violation of the PMPA based on Constructive Termination of the franchise relationship), Judgment as follows: (1) damages for loss of the STIP subsidy in the amount of $50,388.00; (2) based on the evidence presented by plaintiffs' expert, these lost subsidy amounts began on January 1, 2000, averaged $1,866.22 a month through March 31, 2002, and ended on

April 1, 2002 when plaintiff entered into a Motiva lease; prejudgment interest is awarded on these amounts at an annual rate of 3.08% and shall run from the date each payment would have been made to the date of entry of judgment; and (3) damages for lost business value in the amount of $105,318.00, with prejudgment of interest at an annual rate of 2.75% from December 31, 2003 to the date of entry of judgment.

(ii) As to Count II (Violation of the PMPA based on Constructive Non-Renewal of the franchise relationship), Judgment as follows: (1) damages for excess rent in the amount of $63,192.00; (2) based on the evidence presented by plaintiffs' expert, the excess rent payments began on April 1, 2002, were $2,992.00 a month from that date through March 31, 2003, and were $3,032.00 a month from April 1, 2003 th[r]ough December 31, 2003; prejudgment interest is awarded on these amounts at an annual rate of 2.85% and shall run from the date of each overcharge to the date of entry of judgment; and (3) damages for lost business value in the amount of $105,318.00, with prejudgment interest at an annual rate of 2.75% from December 31, 2003 to the date of entry of judgment.

(iii) As to Count V (Breach of the Lease), Judgment as follows: (1) damages for loss of the STIP subsidy in the amount of $50,388.00; (2) based on the evidence presented by plaintiffs' expert, these lost subsidy amounts began on January 1, 2000, averaged $1,866.22 a month through March 31, 2002, and ended on April 1, 2002 when plaintiff entered into a Motiva lease; prejudgment interest shall be awarded on these amounts at an annual rate of

12% and shall run from the date each payment would have been made to the date of entry of judgment; and (3) damages for lost business value in the amount of $105,318.00, with prejudgment interest at an annual rate of 12% from December 31, 2003 to the date of entry of judgment.

(iv) As to Count VI (Breach of the Supply Contract–Open Price Term), Judgment in the amount of $98,824.00, with prejudgment interest at an annual rate of 12% from December 31, 2003 to the date of entry of judgment.

(v) Because plaintiff's claims under Count II (Violation of the PMPA based on Constructive Termination of the franchise relationship) and under Count V (Breach of the Lease) sought the same damages for loss of the STIP subsidy and lost business value and the jury awarded the same damages, plaintiff is entitled to recover as to those two awards only once. Because the prejudgment interest rate is different for the two Counts, plaintiff shall be awarded the higher damage award.

9. Judgment in favor of Plaintiff **Sid Prashad** against Defendants, Shell Oil Company, Shell Oil Products Company, and Motiva Enterprises LLC, jointly and severally, on Counts II, V, and VI as follows:

(i) As to Count II (Violation of the PMPA based on Constructive Termination of the franchise relationship), Judgment as follows: (1) damages for loss of the STIP subsidy in the amount of $17,008.00; (2) based on the evidence presented by plaintiffs' expert, these lost subsidy amounts began on January 1, 2000, averaged $2,429.71 a month through July 31, 2000, and ended on August 1, 2000 when plaintiff entered into a Motiva

lease; prejudgment interest is awarded on these amounts at an annual rate of 3.08% and shall run from the date each payment would have been made to the date of entry of judgment; and (3) damages for lost business value in the amount of $85,830.00, with prejudgment interest at an annual rate of 2.75% from December 31, 2003 to the date of entry of judgment.

(ii) As to Count II (Violation of the PMPA based on Constructive Non-Renewal of the franchise relationship), Judgment as follows: (1) damages for excess rent in the amount of $100,922.00; (2) based on the evidence presented by plaintiffs' expert, the excess rent payments began on August 1, 2000, were $2,159.00 a month from that date through July 31, 2001, were $2,429.00 a month from August 1, 2001 th[r]ough July 31, 2002, and were $2,698.00 a month from August 1, 2002 th[r]ough December 31, 2003; prejudgment interest is awarded on these amounts at an annual rate of 2.85% and shall run from the date of the overcharge to the date of entry of judgment; and (3) damages for lost business value in the amount of $85,830.00, with prejudgment interest at an annual rate of 2.75% from December 31, 2003 to the date of entry of judgment.

(iii) As to Count V (Breach of the Lease), Judgment as follows: (1) damages for loss of the STIP subsidy in the amount of $17,008.00; (2) based on the evidence presented by plaintiffs' expert, these lost subsidy amounts began on January 1, 2000, averaged $2,429.71 a month through July 31, 2000, and ended on August 1, 2000 when plaintiff entered into a Motiva lease; prejudgment interest is award-

ed on these amounts at an annual rate of 12% and shall run from the date each payment would have been made to the date of entry of judgment; and (3) damages for lost business value in the amount of $85,830.00, with prejudgment interest at an annual rate of 12% from December 31, 2003 to the date of entry of judgment.

(iv) As to Count VI (Breach of the Supply Contract–Open Price Term), Judgment in the amount of $69,270.00, with prejudgment interest at an annual rate of 12% from December 31, 2003 to the date of entry of judgment.

(v) Because plaintiff's claims under Count II (Violation of the PMPA based on Constructive Termination of the franchise relationship) and under Count V (Breach of the Lease) sought the same damages for loss of the STIP subsidy and lost business value and the jury awarded the same damages, plaintiff is entitled to recover as to those two awards only once. Because the prejudgment interest rate is different for the two Counts, plaintiff shall be awarded the higher damage award.

10. Judgment in favor of Plaintiff **Akmal, Inc.** against Defendants, Shell Oil Company, Shell Oil Products Company, and Motiva Enterprises LLC, jointly and severally, on Counts II, V, and VI as follows:

(i) As to Count II (Violation of the PMPA based on Constructive Termination of the franchise relationship), Judgment as follows: (1) damages for loss of the STIP subsidy in the amount of $173,198.00; (2) based on the evidence presented by plaintiffs' expert, these lost subsidy amounts began on January 1, 2000, averaged $3,626.91 a month during that year, averaged $3,552.25 a

month during 2001, and averaged $3,627.00 a month during 2002 and 2003; prejudgment interest is awarded on these amounts at an annual rate of 3.08% and shall run from the date the payment would have been made to the date of entry of judgment; and (3) damages for lost business value in the amount of $44,573.00, with prejudgment interest at an annual rate of 2.75% from December 31, 2003 to the date of entry of judgment.

(ii) As to Count II (Violation of the PMPA based on Constructive Non-Renewal of the franchise relationship), Judgment as follows: (1) damages for lost business value in the amount of $44,573.00; and (2) prejudgment interest on the $44,573.00 shall be at an annual rate of 2.75% from December 31, 2003 to the date of entry of judgment.

(iii) As to Count V (Breach of the Lease), Judgment as follows: (1) damages for loss of the STIP subsidy in the amount of $173,198.00; (2) based on the evidence presented by plaintiffs' expert, these lost subsidy amounts began on January 1, 2000, averaged $3,626.91 a month during that year, averaged $3,552.25 a month during 2001, and averaged $3,627.00 a month during 2002 and 2003; prejudgment interest is awarded on these amounts at an annual rate of 12% and shall run from the date the payment would have been made to the date of entry of judgment; and (3) damages for lost business value in the amount of $44,573.00, with prejudgment interest at an annual rate of 12% from December 31, 2003 to the date of entry of judgment.

(iv) As to Count VI (Breach of the Supply Contract–Open Price Term), Judgment in the amount of

$42,264.00, with prejudgment interest at an annual rate of 12% from December 31, 2003 to the date of entry of judgment.

(v) Because plaintiff's claims under Count II (Violation of the PMPA based on Constructive Termination of the franchise relationship) and under Count V (Breach of the Lease) sought the same damages for loss of the STIP subsidy and lost business value and the jury awarded the same damages, plaintiff is entitled to recover as to those two awards only once. Because the prejudgment interest rate is different for the two Counts, plaintiff shall be awarded the higher damage award.

11. In summary, the damages amounts for each of the preceding plaintiffs are as follows[2]:

Plaintiff	Principal and Interest through 9/30/06	Daily Interest from 9/30/06
Sullivan	$326,111.71	$78.31
RAM	$413,550.96	$121.11
Pisarczyk	$355,450.15	$90.40
Karol	$520,780.93	$125.52
Mac's Shell (Southbridge)	$680,347.51	$174.05
Mac's Shell (Webster)	$612,817.85	$155.95

[2] A chart showing the breakdown of the damages calculations for each of the counts for each plaintiff is attached as Exhibit A to this Order. In particular, the damages awarded for Count II (Constructive Termination) are duplicative of the damages awarded for Count V (Breach of Lease), so only one of these damages amounts can be awarded.

J&M Avramidis	$546,392.93	$133.38
Prashad	$447,122.28	$95,04
Akmal, Inc.	$445,459.83	$134.29

12. Judgment in favor of Defendants, Shell Oil Company, Shell Oil Products Company, and Motiva Enterprises LLC against Plaintiffs, **John A. Sullivan**, **RAM Corporation, Inc.**, **Stephen Pisarczyk**, **Cynthia Karol**, **Mac's Shell Service, Inc. (Southbridge and Webster)**, **J&M Avramidis, Inc.**, **Sid Prashad**, and **Akmal, Inc.** as to Counts I (Request for injunctive relief), III (Violation of M.G.L. Chapter 93A), IV (Violation of M.G.L. Chapter 93E), VII (Breach of Implied Warranty of Good Faith and Fair Dealing), VIII (Promissory Estoppel), and IX (Declaratory Judgment).

13. Judgment in favor of Defendants, Shell Oil Company, Shell Oil Products Company, and Motiva Enterprises LLC, against Plaintiff **Three K's, Inc.** as to all claims (Counts I-IX).

14. The Judgment (compensatory damages plus accrued prejudgment interest) will bear post judgment interest at the judgment rate specified by 28 U.S.C. sec. 1961 until fully satisfied.

15. All relief not expressly granted is denied.

16. This Court shall retain jurisdiction of this matter for purposes of the enforcement of the provisions of this Judgment.

SO ORDERED: /s/ Rya W. Zobel
HON. RYA W. ZOBEL
UNITED STATES DISTRICT JUDGE

DATED: [October 27, 2006]

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 01-11300-RWZ

FRANCIS MARCOUX, ET AL.,

v.

SHELL OIL PRODUCTS CO., INC.,
AND MOTIVA ENTERPRISES, LLC

MEMORANDUM OF DECISION AND ORDER

December 26, 2006

ZOBEL, D.J.

Plaintiffs, ten Shell Oil dealers, move for an award of attorneys' fees and expert witness fees pursuant to the Petroleum Marketing Practices Act ("PMPA"), 15 U.S.C. § 2805(d)(1)(C). They further move for an award of costs under Fed. R. Civ. P. 54(d) and 28 U.S.C. § 1920, as well as post-judgment interest. For the reasons stated below, plaintiffs' motion is allowed in part.

I. Background

On July 27, 2001, sixty current and former lessee-dealers of Shell Oil brand automobile gasoline brought this action for breach of contract and violations of the Petroleum Marketing Practices Act ("PMPA") against defendants Shell Oil Company, Inc., Shell Oil Company Products, LLC and Motiva Enterprises, LLC (hereinafter collectively "Shell Oil"). The court ordered an ini-

tial trial of the claims of ten plaintiffs, which was held from November 15 to December 8, 2004, and resulted in a unanimous verdict of $3.3 million for those plaintiffs. (Docket #335). Plaintiffs moved for an award of punitive damages under the PMPA, which the court denied. (Docket #342). The parties jointly moved for entry of judgment pursuant to Fed. R. Civ. P. 54(b), which the court allowed on August 31, 2006 (Docket #397), and entered an order of judgment on October 27, 2006. (Docket #401).

Plaintiffs now seek fees and costs in the amount of $2.78 million.[1] (Docket #387). Specifically, they seek fees for six attorneys in the amount of $2,109,340.30 and for three paralegals in the amount of $129,316.50. Plaintiffs further seek expert fees in the amount of $424,001.53 and costs in the amount of $125,782.94.

Defendants oppose the motion (Docket # 391) [ ] on a number of grounds: that (1) the hourly rate sought in attorneys' fees is in excess of the prevailing rate in the relevant market; (2) plaintiffs have failed to exclude time spent on matters for which no fee is allowed (in particular, claims related to the UCC); (3) that the billing statements reveal duplicative and excessive effort expended by certain attorneys; (4) the expert fees are excessive; and (5) costs are excessive and the sought for expenses not recoverable under the relevant statutes.

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[1] On August 11, 2004, the court sanctioned Shell for their "inexcusable" discovery delays in this case. The court ordered Shell to pay $7,300 in fees and $306.58 in costs. (Docket #261). Plaintiffs have deducted this amount ($7,606.58 in sum) from their total attorneys' and paralegal fees sought ($2,788,411.27). Accordingly, the total award they seek is $2,780,834.69. As discussed at 8 n.4, infra, I similarly deduct $7,606.58 from the attorneys' fees awarded.

II. Discussion

A. Plaintiffs' Request for Attorneys' Fees

The PMPA provides that a franchisee who prevails in an action under the statute is entitled to "reasonable attorney and expert witness fees" under 15 U.S.C. § 2805(d)(1)(C).[2] That plaintiffs are entitled to reasonable attorneys' and expert witness fees is uncontroverted. The remaining question, then, concerns the amount of fees to be awarded.

* * * * *

III. Conclusion

Plaintiffs' motion for attorneys' fees and costs (Docket #387-1) is ALLOWED in part. Defendants are ordered to pay **$1,406,659.40** which is comprised of attorneys' fees in the amount of **$1,163,792.92**; expert witness fees in the amount of **$209,079.59**; costs in the amount of **$33,786.89**; and post-judgment interest at the statutory rate. Plaintiffs' motion requesting a status conference (Docket #403) to discuss future phases of discovery is ALLOWED. A status conference has been scheduled for January 18, 2007 at 3 p.m.

December 26, 2006
DATE

/s/ Rya W. Zobel
RYA W. ZOBEL
UNITED STATES DISTRICT JUDGE

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[2] That section provides, in pertinent part: "If the franchisee prevails in any action under subsection (a) of this section, such franchisee shall be entitled (c) to reasonable attorney and expert witness fees to be paid by the franchisor, unless the court determines that only nominal damages are to be awarded to such franchisee, in which case the court, in its discretion, need not direct that such fees be paid by the franchisor." 15 U.S.C. § 2805(d)(1)(C).

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 05-2771

FRANCIS MARCOUX, ET AL.,
Plaintiffs,

MAC'S SHELL SERVICE, INC.; CYNTHIA KAROL; JOHN A. SULLIVAN; AKMAL, INC.; SID PRASHAD; RAM CORPORATION, INC.; J&M AVRAMIDIS, INC.; THREE K'S, INC.; STEPHEN PISARCZYK,
Plaintiffs-Appellees,

v.

SHELL OIL PRODUCTS COMPANY LLC; MOTIVA ENTERPRISES LLC; SHELL OIL COMPANY, INC.,
Defendants-Appellants.

Appeal from the United States District Court
for the District of Massachusetts
(Hon. Rya W. Zobel, U.S. District Judge)

April 18, 2008

Before TORRUELLA, HOWARD, Circuit Judges, and DELGADO-COLÓN,* District Judge.

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* Of the District of Puerto Rico, sitting by designation.

HOWARD, Circuit Judge.

Defendants-appellants Shell Oil Company, Shell Oil Products Company (collectively, "Shell"), and Motiva Enterprises appeal jury verdicts against them on several claims relating to their treatment of plaintiffs-appellees (the "Dealers"), franchisees and operators of Shell-branded service stations. Shell and Motiva (together, "the defendants") challenge the legal basis for verdicts against them under a federal statute designed to protect franchisees, as well as the verdicts under Massachusetts state law. Additionally, they appeal the jury's damages determinations as without sufficient basis in the evidence. We affirm in part and reverse in part.

Facts

We recite the facts in the light most favorable to the jury's verdict. *See Rodriguez-Torres v. Caribbean Forms Mfr., Inc.*, 399 F.3d 52, 56 (1st Cir. 2005).

Shell maintained a network of franchisees in Massachusetts. Plaintiffs were eight of these franchisees. In 1998, Shell, Texaco, and Star Enterprises formed defendant Motiva, and Shell transferred the franchise relationships to that entity, assigning its rights and duties under the relevant contracts to Motiva.[1] Shortly thereafter, Motiva replaced the Variable Rent Program ("VRP") with the Special Temporary Incentive Program ("STIP"). Each of these programs (collectively, the "Subsidy") provided for reduction of the contract rent through sales of

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[1] The Petroleum Marketing Practices Act, 15 U.S.C. §§ 2801-2806 (the "PMPA"), defines "franchise" as the collection of agreements relating to three elements: the lease of the premises, the license to use the franchisor's trademark, and the agreement governing the supply of branded motor fuel. *Id.* § 2801(1). These three elements are sometimes referred to as the "statutory elements of the franchise."

gasoline; once the specified threshold gallonage was sold in a given month, the contract rent for the next month would be discounted by a certain amount for every gallon sold in excess of that threshold. The threshold amount and the discount amount changed from time to time. The Subsidy had been in effect since 1982; it was renewed in an annual notice to franchisees, although its terms explicitly provided for cancellation with thirty days' notice. Various representations were made to the Dealers to the effect that the Subsidy or something like it would always exist, the contract rent was to be disregarded, and the cancellation provision was only intended to be invoked in a situation like a war or an oil embargo. Nevertheless, having given the required notice, Motiva ended the STIP on January 1, 2000, terminating the Subsidy. Without the Subsidy, the Dealers paid much more rent.

Motiva also offered new leases as the old leases expired. The new leases calculated rent differently than the old leases, resulting in a further increase in rent.

In accordance with their fuel supply contracts, the Dealers were charged a wholesale price for gasoline known as the Dealer Tank Wagon price (the "DTW price"). The fuel supply contracts were open price term contracts: the contracts were silent as to price, and one party set the price unilaterally. This price was set by the defendants, who calculated it by assessing the street prices of other competing gasoline stations in the area, and reducing those prices by the taxes levied on gasoline and an Estimated Industry Margin to approximate the wholesale price of the defendants' competitors.

Proceedings Below

Several franchisees, along with an unincorporated association called the Shell Dealers Defense Group (the "Defense Group"), filed for injunctive and declaratory re-

lief as well as damages on June 6, 2000. Compl., *Tsaniklides v. Shell Oil Products Co.*, 00-CV-11295. When the Defense Group was found to lack standing, a motion was made to add its members as individual plaintiffs. In denying that motion the district court indicated in a margin order, "[P]laintiffs may file a new case which may be deemed to be related." The individual franchisees filed a new suit on July 27, 2001, and the original suit was voluntarily dismissed on August 10. The new suit was assigned to the same district judge. The cases of New Hampshire and Rhode Island plaintiffs in the new action were transferred to those districts. From the sixty-four Massachusetts plaintiffs in the new suit, ten plaintiffs were chosen to go forward. One of those settled on the eve of trial and another lost at summary judgment. One plaintiff of the remaining eight, Mac's Shell Service, Inc., operated two stations that were sometimes treated as separate plaintiffs. Therefore, eight plaintiffs representing nine stations proceeded to trial.

The Dealers sued under a variety of theories. First, they contended that the Subsidy had been incorporated into the property leases, although the written leases purported to be integrated contracts under Massachusetts law. They claimed the amended contracts were then breached when Motiva eliminated the Subsidy. Under the Dealers' theory, this breach gave rise to two distinct claims: a state cause of action for breach of contract and a claim under the PMPA that Shell had improperly terminated the franchises when Shell assigned the franchise agreements to Motiva and Motiva terminated the Subsidy. Because no actual termination occurred, the Dealers proceeded under a theory of "constructive termination." Similarly, they claimed Motiva had "constructively nonrenewed" the franchise relationships in violation of

the PMPA (even though the franchises were in fact renewed) because the new contracts changed the rent-calculation method and increased the rent, along with other objectionable changes. Finally, the Dealers argued that Motiva failed to set prices for gasoline in good faith, as required for open price term contracts under Massachusetts law.

The defendants unsuccessfully moved for dismissal on all constructive termination claims and the constructive nonrenewal claims of two plaintiffs on the ground that they were time-barred. They also moved for a judgment as a matter of law on all claims. Following a jury verdict against them on all claims, they properly renewed this motion. They moved as well for a new trial and to set aside the jury's damages awards. The defendants now appeal the denial of all of these motions.

The PMPA

Congress enacted Title I of the PMPA to "remedy the disparity in bargaining power between franchisors and franchisees." S. Rep. No. 95-731, 95th Cong., 2d Sess. 18; *see also Four Corners Serv. Station v. Mobil Oil Corp.*, 51 F.3d 306, 310 (1st Cir. 1995). Because franchisees claimed that this unequal power was often wielded through arbitrary or discriminatory termination or nonrenewal, or *threats* of termination or nonrenewal, the PMPA aimed to remove this potent weapon from the franchisors' arsenal. S. Rep. No. 95-731, at 17 ("Numerous allegations have been made before Congressional committees investigating petroleum marketing problems that terminations and non-renewals, or threats of termination or non-renewal, have been used by franchisors to compel franchisees to comply with marketing policies of the franchisor."); *id.* at 18 ("[T]ermination of franchise agreements during the term as a remedy for contract vio-

lations has been repeatedly utilized."). The "PMPA attempts to level the playing field by restricting the grounds upon which a franchisor can assert a unilateral termination or nonrenewal of a franchise." *Id.*[2]

The PMPA makes a distinction between a "franchise" and the "franchise relationship." The franchise is a set of definite agreements for 1) lease of the premises, 2) the right to purchase gasoline for resale, and 3) the right to use the franchisor's trademark. 15 U.S.C. § 2801(1). "Franchise relationship" refers to the respective obligations of the franchisor and franchisee created by a franchise. *Id.* § 2801(2). The legislative history of the PMPA makes clear that "franchise" and "franchise relationship" were distinguished to drive home the fact that the franchise relationship survives the expiration of the agreements underlying the franchise. *See* S. Rep. No. 95-731, 95th Cong., 2d Sess. 30 ("The term 'franchise relationship' is utilized to avoid any contention that because the 'franchise' does not exist there is nothing to renew."). The structure and history of the PMPA emphasize Congress's view that the franchisees have a reasonable expectation that the franchises would be renewed and that the relationships would continue.

Accordingly, the PMPA forbids termination of a franchise or nonrenewal of a franchise relationship except under enumerated circumstances and with proper notice.

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[2] The PMPA is concerned not only with termination of a franchise agreement, but also with a franchisor's failure to renew such an agreement when it expires. Although the constellation of agreements (real property leases, fuel supply agreements, licenses to use franchisor's trademark) that make up the franchise are definite in term, the "[r]easonable expectations of the parties to a motor fuel franchise are that the relationship will be a continuing one." *Id.* This, of course, encourages franchisees to invest in their franchises and to build up goodwill that benefits both parties.

See 15 U.S.C § 2802(a) (nonrenewals and terminations generally prohibited); *id.* §§ 2802(b)(2)-(3) (grounds for termination and non-renewal); *id.* § 2804 (notice requirements). The PMPA provides a cause of action to franchisees who suffer termination or nonrenewal in violation of the relevant sections. *Id.* § 2805(a). As long as the action is brought within one year of the termination or nonrenewal complained of, *id.* § 2805(a)(1), the franchisee may seek preliminary injunctive relief, *id.* § 2805(b)(2), damages, *id.* § 2805(d), and "such equitable relief as the court determines is necessary," *id.* § 2805(b)(1). The PMPA mandates that preliminary relief "shall" be granted if the plaintiff shows 1) termination or nonrenewal and 2) "sufficiently serious questions going to the merits" that are "a fair ground for litigation," and the court determines 3) that the balance of hardships tips in favor of granting the injunction. *Id.* § 2805(b)(2). In all private civil actions for termination or nonrenewal, it is the franchisee's burden to show termination or lack of renewal. *Id.* § 2805(c).

Standard of Review

We review the denial of judgment as a matter of law de novo as to issues of law. *See Rodriguez-Torres*, 399 F.3d at 57. As to matters of fact, we view the evidence in the light most favorable to the verdict, asking only whether a rational jury could on the basis of that evidence find as the jury has. *See id.* We review a denial of a motion for a new trial for "a manifest abuse of discretion." *United States v. George*, 448 F.3d 96, 101 (1st Cir. 2006). We "will order a new trial only if the verdict is against the demonstrable weight of the credible evidence or results in a blatant miscarriage of justice." *Whitfield v. Meléndez-Rivera*, 431 F.3d 1, 9 (1st Cir. 2005) (internal quotation omitted). We will uphold a jury award if it is a

result of "any rational appraisal or estimate of the damages that could be based on the evidence before the jury." *Data Gen. Corp. v. Grumman Sys. Support Corp.*, 36 F.3d 1147, 1172 (1st Cir. 1994) (quoting *Anthony v. G.M.D. Airline Servs.*, 17 F.3d 490, 493 (1st Cir. 1994)). Because it is complex and requires some procedural background, we discuss the applicable standard of review for the statute of limitations claim within the discussion of that issue.

Statute of Limitations

The PMPA contains a one-year statute of limitations.[3] The district court found, and the defendants here do not contest, that the cause of action for constructive termination arose on January 1, 2000, when Motiva terminated the Subsidy. The defendants claim that all of the constructive termination claims are time-barred because this action was not filed until almost nineteen months later, on July 27, 2001.[4] The Dealers point out that in dismissing their motion to be added as plaintiffs to the old action, the district court gave them leave to file a new action "which may be deemed to be related" to the original complaint, and that the first action was not dismissed until after the second was filed.

The defendants filed a motion to dismiss for failure to state a claim on which relief might be granted, citing the

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[3] "[N]o such action shall be maintained unless commenced within 1 year after the later of—(1) the date of termination of the franchise or nonrenewal of the franchise relationship; or (2) the date the franchisor fails to comply with the requirements of section 102 or 103." 15 U.S.C. § 2805(a).

[4] In the light of our disposition of the constructive nonrenewal claims as a whole, it is unnecessary to complicate this analysis with the defendants' further claim that two of the lease renewals are also time-barred on the same theory.

lapse of time and the PMPA's statute of limitations. This motion was denied.[5]

Our review of the record indicates that the district court denied the motion to add the individual plaintiffs only because it granted the plaintiffs a right to file a new action that related back. We further conclude that had the district court allowed the motion to amend, the amended pleading would have related back under Federal Rule of Civil Procedure 15. In the light of this, two powerful reasons lead us to uphold the district court's resolution of this issue: first, all the purposes of Rule 15(c) are satisfied, if not its letter; and second, the district court was in a better position when it placed the case in this posture than we are now to assess whether the interests of justice are served by permitting this relation back.[6]

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[5] The Dealers assert, as they have since their opposition to the motion to dismiss, that this resolution of the motion to amend was the result of a compromise regarding discovery vis-à-vis the new parties. At oral argument, the defendants denied ever agreeing to such a solution.

[6] We note that this issue was disposed of below in the district court's denial of a motion to dismiss. The parties skirmish about whether such a denial may even be appealed after a jury trial. Where a denial of a motion for summary judgment is predicated on a genuine dispute over issues of material fact, such a denial is not normally reviewable in this circuit after a "full-dress trial." *Lama v. Borras*, 16 F.3d 473, 476 n.5 (1st Cir. 1994). The Dealers argue, with reason, that this would apply *a fortiori* to a denial of a 12(b)(6) motion. *See Bennett v. Pippin*, 74 F.3d 578, 585 (5th Cir. 1996) ("When the plaintiff has prevailed after a full trial on the merits, a district court's denial of a Rule 12(b)(6) motion becomes moot."). But here the question is one of law—whether relation back can be applied outside of the strict confines of Rule 15(c). We think it likely that this changes the analysis, but because we ultimately hold that relation back was appropriate, it makes no difference: even assuming that the issue was properly preserved, the statute of limitations argument

Federal Rule of Civil Procedure 15(c) provides that an amended pleading may be deemed to "relate back" for statute of limitations purposes to the date of the pleading if certain conditions are met. The defendants rightly point out that Rule 15 concerns amended pleadings, not new pleadings in separate actions. "Rule 15(c) simply does not apply where, as here, the party bringing suit did not seek to 'amend' or 'supplement' his original pleading, but, rather, opted to file an entirely new [action] at a subsequent date." *Neverson v. Bissonnette*, 261 F.3d 120, 126 (1st Cir. 2001) (noting that a dismissal without prejudice leaves the plaintiff "in the same situation as if [the] first suit had never been filed" for purposes of Rule 15(c)). We note that this case differs from *Neverson* in that here the dismissal of the previous action did not occur until *after* the new pleading was filed, and we note further that the district court expressly suggested a new action be filed at the very moment it denied leave to amend the complaint in the first action.

Acknowledging that the letter of Rule 15 is not met here, we conclude that the rule nonetheless does provide some guidance. Rule 15(c) is "intimately connected with the policy of the statute of limitations." Fed. R. Civ. P. 15(c), advisory committee note. The purpose of statutes of limitations is to avoid the difficulties inherent in litigat-

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fails. We express no view as to whether in the general case a denial of a 12(b)(6) motion may be appealed after a jury trial; we move on to discuss the relation-back issue only because we think it important to consider whether the district court acted properly in acting outside the letter of the Federal Rules of Civil Procedure. In conducting this analysis, we apply de novo review to the pure legal question. Finding, as we do, that as a matter of law such relation back is within the power of the district court, we then review the decision to grant relation back for abuse of discretion. The finding of facts necessary to that conclusion we review for clear error.

ing matters long past, and to provide repose to potential defendants regarding such matters. *See Nelson v. County of Allegheny*, 60 F.3d 1010, 1014 (3d Cir. 1995) ("Statutes of limitations ensure that defendants are protected against the prejudice of having to defend against stale claims, as well as the notion that, at some point, claims should be laid to rest so that security and stability can be restored to human affairs.") (internal quotation omitted). The defendants at no time could have expected or enjoyed repose regarding these matters. The denial of the motion to add the specific Dealers to the original litigation was accompanied in the same breath by notice that a new complaint might be filed under the same facts. This occurred in a timely fashion. And the first litigation was not dismissed until after the second one was filed. No evidence of sandbagging was brought forward, nor do we infer any prejudice to the defendants on this record.[7]

Here, the Dealers had sought to vindicate their rights as the Defense Group, but lacked standing in that guise. In denying a motion to add the plaintiffs to the original litigation, the district court indicated it would allow a new filing to relate back to the date of the old one. It seems clear that the district court could instead have allowed the pleadings to be amended to name the plaintiffs individually. While we cannot say with certainty why one course of action was to be preferred over another, we are confident that the district court did not abuse its discretion.

Rule 15(c) does not specifically contemplate the substitution of plaintiffs. *See* Fed. R. Civ. P. 15(c), advisory committee note ("The relation back of amendments

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[7] We note also that the record is replete with delays by the defendants, and to that extent their equitable claim to the benefits of a speedy process is attenuated.

changing plaintiffs is not expressly treated in revised Rule 15(c), since the problem is generally easier."). But this is not a bar to relation back here either; assuming that the general principles of Rule 15 are to govern this admittedly unusual situation, we find that substituting plaintiffs here wreaks no injustice.

> [W]e have laid down three separate requirements applicable to plaintiffs who seek succor under Rule 15(c)(3): The amended complaint must arise out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading; there must be a sufficient identity of interest between the new plaintiff, the old plaintiff, and their respective claims so that the defendants can be said to have been given fair notice of the latecomer's claim against them; and undue prejudice must be absent.

Young v. Lepone, 305 F.3d 1, 14 (1st Cir. 2002) (quoting *Allied Int'l v. International Longshoremen's Ass'n*, 814 F.2d 32, 35-36 (1st Cir. 1987)). Accepting, as the district court did, that the Dealers were members of the Defense Group,[8] these factors are met here. The district court's factual conclusion does not represent an abuse of discretion, and so we adopt it.

The original complaint states the same causes of action, arising from the same events, as the new complaint. The Dealers have always claimed that they were all members of the Defense Group. That organization was established only to assert its members' rights and protect

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[8] The Dealers presented testimony on this issue at trial. While that testimony was of course not available to the district court when it decided the motion to amend in *Tsaniklides* and the motion to dismiss in this case, it does help to corroborate the district court's determination.

their interests, and so we find sufficient identity of interest to put the defendants on notice of the claims against them. And there is no undue prejudice where the Dealers are simply asserting themselves a claim they had made through a proxy well within the statute of limitations. Had the motion to amend been granted, and the individual plaintiffs named, relation back would have been within the district court's discretion. The district court, then, properly allowed the relation back of the new case to the previous one, and therefore did not err when it denied the motion to dismiss.[9]

State Contract Claim

The defendants appeal the jury's determination that the leases were orally amended to include the Subsidy, and therefore when the Subsidy was ended, the leases were breached. First, the defendants contend that the leases were completely integrated, meaning oral representations before or during the execution of the contract must be excluded by the parol evidence rule. Second, they claim that even if the leases were not integrated, the jury had insufficient evidence to conclude that the leases were amended to include a promise to continue the Subsidy.

The defendants argue as an initial matter that the leases were completely integrated agreements. The leases indisputably represented that they were integrated agreements and that any subsequent modification had to

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[9] The Dealers provide two alternate theories on which to uphold the denial of the motion to dismiss: equitable estoppel and equitable tolling of the statute of limitations. Because the district court denied the motion to dismiss on the basis of relation back, we have found it most convenient to follow that analysis here. We note only that all of these approaches address the fundamental issue of whether defendants suffer undue prejudice as a result of delay or lack of notice.

be in writing. The defendants claim the integration clause operated to insulate the leases from oral representations made prior to or contemporaneous with execution. But a document is not integrated merely because it says so. *See* Restatement (Second) of Contracts § 209 cmt. b (1981) ("Written contracts, signed by both parties, may include an explicit declaration that there are no other agreements between the parties, but such a declaration may not be conclusive.").

In Massachusetts, "the question of integration is one of fact reserved for the trial judge, whose resolution of that issue will not be reversed unless clearly erroneous." *Cambridgeport Sav. Bank v. Boersner*, 413 Mass. 432, 436 n.7 (1992); *Antonellis v. Northgate Constr. Corp.*, 362 Mass. 847, 850-51 (1973) (even absent specific evaluation of evidence by trial judge, finding of non-integration upheld as not clearly erroneous); *Alexander v. Snell*, 424 N.E.2d 262, 264 (Mass. App. Ct. 1981); *accord Brennan v. Carvel Corp.*, 929 F.2d 801, 807 (1st Cir. 1991) ("[U]nder Massachusetts law, the determination of whether a contract is completely or partially integrated, or whether a second contract is collateral to an integrated agreement, is a question of fact to be decided in the first instance by the trial judge.").[10]

Here, the district court did not make a specific finding about integration, but the charge to the jury on amend-

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[10] We are not governed by state practice as to the division of labor between judge and jury, even in diversity cases, *see Byrd v. Blue Ridge Rural Elec. Coop.*, 356 U.S. 525, 538 (1958), but in all events federal practice likewise lets judges determine whether an agreement is integrated, *Merk v. Jewel Food Stores Div. of Jewel Cos.*, 945 F.2d 889, 893 (7th Cir. 1991) (applying federal common law of contracts and holding that '[w]hether a writing is fully integrated is generally a question of law to be resolved by a court").

ments compels the inference that the agreements were not integrated. The jury was instructed to consider what the parties said and did concerning the lease; because the instruction did not exclude actions prior to or contemporaneous with the execution of the written lease, the district court must have concluded that the lease was not an integrated agreement.

After review of the record, we cannot say that this determination was clear error. The Subsidy was explained to each plaintiff in documents accompanying the lease, and many plaintiffs testified they regarded the Subsidy as essential to their businesses. There was evidence that the defendants said that the Subsidy was intended to be permanent, that the 30-day-notice provision was only in place for cases of war or embargo, and that the Dealers could rely on the continuation of the Subsidy or something like it. The district court therefore had ample evidence before it to determine that the lease was not an integrated agreement.

Because the leases were not integrated, they could be varied by mutual agreement. "Mutual agreement on modification of the requirement of a writing may . . . be inferred from the conduct of the parties and from the attendant circumstances." *First Pa. Mortg. Trust v. Dorchester Sav. Bank*, 395 Mass. 614, 625 (1985) (internal quotation omitted). The defendants assert that the evidence was insufficient to allow the jury to decide, as it did, that a promise to continue the Subsidy was incorporated into the leases. The district court instructed the jury: "[Y]ou may consider what each one said, one to the other, how they behave[d], what each did, what each knew and what the circumstances were . . . then you may infer . . . from their statements and their conduct . . . whether both Shell and each plaintiff agreed to amend

the leases." Evidence adduced at trial included not only representations made directly to the Dealers that the Subsidy or something like it would always be available, but also internal Shell documentation indicating that the Subsidy was intended to be permanent, that franchisees should plan their businesses around the continued availability of the Subsidy, and that franchisees would understand the loss of the Subsidy to be a breach of a promise by Shell. A rational jury viewing this evidence might come to the conclusion that the leases were amended to include the Subsidy.

Constructive Termination

The Dealers claimed that when Motiva breached their leases by eliminating the Subsidy, that breach perfected a constructive termination by Shell. The PMPA allows assignment of duties in franchise agreements in accordance with state law. *See* 15 U.S.C. § 2806(b). But an assignment that is violative of state law, or one that results in a breach of one of the statutory components of a franchise, gives rise to a claim under the PMPA against the original franchisor/assignor. In the words of the Fourth Circuit, "A franchisor cannot circumvent the protections the [PMPA] affords a franchisee by the simple expedient of assigning the franchisor's obligation to an assignee who increases the franchisee's burden . . . ." *Barnes v. Gulf Oil Corp.*, 795 F.2d 358, 362 (4th Cir. 1986) (reversing summary judgment and holding that where assignee breaches franchise agreement, action will lie against franchisor/assignor). In *Chestnut Hill Gulf v. Cumberland Farms, Inc.*, 940 F.2d 744 (1st Cir. 1991), we adopted the test for constructive termination articulated by the Sixth Circuit.

> To sustain a claim, under the PMPA, that a franchisor assigned and thereby constructively termi-

> nated a franchise agreement, the franchisee must prove either: (1) that by making the assignment, the franchisor breached one of the three statutory components of the franchise agreement, (the contract to use the refiner's trademark, the contract for the supply of motor fuel, or the lease of the premises), and thus, violated the PMPA; or (2) that the franchisor made the assignment in violation of state law and thus, the PMPA was invoked.

Id. at 750-51 (quoting *May-Som Gulf, Inc. v. Chevron U.S.A., Inc.*, 869 F.2d 917, 922 (6th Cir. 1989)).

What set *Barnes* apart from both *Chestnut Hill Gulf* and *May-Som Gulf* was that in *Barnes* the assignment of the contract had resulted in gasoline prices above the price specified in the contract; in other words, *Barnes* concerned a breach of one of the statutory elements of the franchise, the agreement for the supply of branded motor fuel. The Fourth Circuit vacated summary judgment for the defendant, holding that the breach of the contract for the supply of gasoline created a constructive termination of the franchise. In *Chestnut Hill Gulf* we held the PMPA was not implicated because there was no evidence that any of the statutory components of a franchise had been breached. "[A]ll thirteen dealers continued to occupy the same service stations under the same leases; they continued to purchase Gulf brand gasoline under the same supply agreements; and they continued to do business under the same Gulf trademark." *Chestnut Hill Gulf*, 940 F.2d at 752. In *May-Som Gulf*, the defendants were entitled to summary judgment because the plaintiffs had merely complained of *potential* breaches to the franchise agreement. In the case before us, the Dealers have proven to the jury's satisfaction that Motiva breached the lease component of the franchise agree-

ments. That breach allowed the jury to find that Shell constructively terminated the Dealers' franchises when it assigned the franchises to Motiva.

The defendants argue that in order to show a constructive termination, the breach must be contemporaneous with the assignment and the breach must amount to a total deprivation of one of the three elements of the franchise. Both contentions misunderstand constructive termination.

First, we agree with the Fourth Circuit that an action for constructive termination lies against the assignor of a franchise when the assignee breaches the franchise. *Barnes*, 795 F.2d at 362. This prevents the assignor/franchisor from shielding itself against liability through the use of another corporation. "The [PMPA] does not contemplate that a franchisee should be relegated to seeking damages from an assignee that might not have the resources to satisfy a judgment." *Id.* A delay between the assignment and the breach changes nothing. The reasons for this are even stronger where the assignee is a subsidiary of the franchisor, or a joint venture in which the franchisor is a party.

Second, the breach of the statutory element of the franchise does not have to be a total breach. In *Barnes* the plaintiff was "forced to raise her prices, and her sales and net income . . . declined." *Id.* at 361. She did not suffer a complete loss of the benefits of the motor fuel supply contract. The defendants' attempted analogy to constructive termination in employment law or constructive eviction in landlord-tenant law is misleading. Those doctrines require an actual severance of the relationship: The employee must leave the workplace; the tenant must move out. But here, as the Dealers testified, sunk costs, optimism, and the habit of years might lead franchisees

to try to make the new arrangements work, even when the terms have changed so materially as to make success impossible. Indeed, some plaintiffs testified they had gone into personal debt, driven themselves into bankruptcy, or enlisted the aid of family members working without pay to make ends meet. To require an actual abandonment of years of work and investment before we recognize a right of action under the PMPA would be unreasonable. The "congressional plan would be frustrated by requiring a franchisee to go out of business before invoking the protections of the PMPA." *Pro Sales, Inc. v. Texaco, U.S.A.*, 792 F.2d 1394, 1399 (9th Cir. 1986).

We do not here say that any material breach of the lease would necessarily be sufficient to sustain the constructive termination claim. In this case, the district court instructed the jury that it could find constructive termination only if the breach of the lease "was such a material change that it effectively ended the lease, even though the plaintiffs continued to operate the business .... It's not simply was the lease breached, but did that breach amount to ... effectively the end of the franchise relationship." In this instruction the district court set an appropriate threshold.

We agree with the district court that an assignor may be liable for even a subsequent breach of the franchise agreement by an assignee, and that a breach of the franchise agreement need not result in complete deprivation of a statutory element of the franchise to support a constructive termination.

Indeed, this case presents a strong argument for the doctrine of constructive termination. At trial the Dealers argued that Shell assigned the franchise agreements to Motiva, even *created* Motiva, in order to squeeze them

out of their franchises. They presented evidence that this was the reason for the change in the rent formulation, the elimination of the Subsidy, and the dramatic increase in rents they paid. If the jury accepted this as the reason, the case falls within the scope of the PMPA, which is designed not to freeze the franchise agreements exactly where they were,[11] but to prevent franchisors from improperly terminating franchises and thereby to ensure that franchisees benefit from successful investment in their franchises.

This same protection for franchisee expectations underlies the PMPA's requirement that a franchisor make a bona fide offer, or grant a right of first refusal, to the franchisee when the franchisor contemplates withdrawing from the relevant market, selling the underlying real property, or dedicating the property to another use. 15 U.S.C. § 2802(b)(2)(E) & (b)(3)(D). This is also why parts of the PMPA place more restrictions on franchisors when the purpose of termination or nonrenewal is to convert the station to direct operation by the franchisor.[12] Were

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[11] *See May-Som Gulf*, 869 F.2d at 921-22 (noting that the PMPA does not mandate "a permanent status quo" and that the act was not meant to stymie "major national acquisition and large scale divestiture") (quoting *Russo v. Texaco, Inc.*, 630 F. Supp. 682, 683 (E.D.N.Y. 1986)).

[12] For example, subsection 2802(b)(2)(E) requires that a termination made pursuant to a franchisor's withdrawal from "the marketing of motor fuel through retail outlets in the relevant geographic market area" be "not for the purpose of converting the premises . . . to operation by employees or agents of the franchisor for such franchisor's own account." For another example, nonrenewals are normally allowed if they are based on determinations "to materially alter, add to, or replace such premises," or determinations that the franchise "is likely to be uneconomical despite any reasonable changes . . . which may be acceptable to the franchisee." But subsection 2802(b)(3)(D)(ii) explicitly prohibits nonrenewal under those

it otherwise, the franchisor could extract any increase in value created by the franchisee's investment, without sharing that increase with the franchisee. This would dampen the incentive for a franchisee to develop the business. In this case, the Dealers presented evidence that the defendants wanted to convert their stations to direct operation.[13] Where a franchisor has breached its obligations to the franchisee such that the franchisee faces the effective end of the franchise, the PMPA must treat that as a termination of the franchise.

Neither will we contradict the jury's verdict. When we are satisfied that the law has been faithfully interpreted, we will overturn a jury's verdict only when no reasonable jury could have come to that verdict on the facts presented. *See Rodriguez-Torres*, 399 F.3d at 57. The jury heard ample evidence to conclude that the financial hardship resulting from the loss of the Subsidy meant the end

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same circumstances when that determination is "made for the purpose of converting the leased marketing premises to operation by employees or agents of the franchisor." This language forbids termination or nonrenewal under these circumstances *even if* the right of first refusal is given or the bona fide offer is made. (This restriction does not apply to sales of the premises, perhaps because the drafters of the legislation did not imagine that the sale of the underlying premises could be for the purpose of converting the station to the franchisor's control. *But cf. Patel v. Sun Co.*, 141 F.3d 447 (3d Cir. 1998) (when franchisor sells underlying property with leaseback provision to operate service station, PMPA implicated in neither the sale of the property nor the termination of the franchise on expiration of the franchisor's lease).[)]

[13] Nothing in the PMPA would prevent the defendants from buying the Dealers out. What the PMPA does forbid is franchisors using their power to dictate impossible franchise terms in order to force the franchisees to walk away from their investments or to sell them at artificially low prices. That is exactly what the Dealers claimed was happening here.

of the relationship. The defendants had opportunity to attack the credibility of that evidence and to put on their own. We will not step into the jury box to provide a second opinion. Nor was the verdict against the demonstrable weight of the evidence or likely to result in a blatant miscarriage of justice. Consequently, there was no manifest abuse of discretion in the district court's denial of the motion for a new trial.

Constructive Nonrenewal

As each Dealer's lease expired, Motiva presented a new lease. The new leases changed the way rent was calculated, which had the effect of increasing the rents charged. The Dealers argued that this change and others were not made in good faith, as required by the PMPA, but rather were part of the plan to drive the franchisees out of business. They claimed that inclusion of these terms amounted to a nonrenewal of their agreements, even though each Dealer signed a new agreement (albeit "under protest"). We conclude that the PMPA does not support a claim for nonrenewal under these circumstances. We therefore vacate this portion of the district court's judgment and remand with instructions to issue judgment on this claim for the defendants.

It is the plaintiffs' burden to prove that a nonrenewal or a termination has taken place. 15 U.S.C. § 2805(c). A notice of nonrenewal issued pursuant to 15 U.S.C. § 2804, while not strictly speaking a nonrenewal, presumably satisfies this burden. *See Dersch Energies, Inc. v. Shell Oil Co.*, 314 F.3d 846, 864 (7th Cir. 2002) ("[A] franchisor's issuance of a notice of nonrenewal is the precise equivalent of a nonrenewal."); *Lippo v. Mobil Oil Corp.*, 776 F.2d 706, 720 (7th Cir. 1985) ("In an action brought under section 2805(a) the franchisee has the burden of proving termination of the franchise. (This must really

mean attempted termination if the injunctive relief is to be of any use.)"). *But see Seckler v. Star Enter.*, 124 F.3d 1399, 1403 (11th Cir. 1997) (no claim under PMPA when notice of nonrenewal rescinded before action commenced); *Akky v. BP Am.*, 73 F.3d 974, 974 (9th Cir. 1996) (same).

The threshold question is whether to recognize such a "constructive nonrenewal" and thereby bring Motiva's actions within the reach of the PMPA. The Ninth Circuit is the only circuit so far to recognize a claim for constructive nonrenewal. *Pro Sales*, 792 F.2d 1394. In *Pro Sales*, the plaintiff signed a renewal agreement "under protest" and immediately brought suit under the PMPA. *Id.* at 1398. The court relied on legislative history to conclude that these facts gave rise to a claim for constructive nonrenewal under [the] PMPA. *Id.* at 1399.

Pro Sales has been rejected by the other circuits to consider the issue. The PMPA, after all, requires a franchisor to provide a notice of nonrenewal, 15 U.S.C. § 2805(c), and then provides a framework for the franchisee to seek preliminary relief on receipt of that notice, *id.* § 2805(b)(2). Two circuits have held that this notice-and-preliminary-relief structure is evidence that Congress intended to limit the reach of the PMPA to cases where either a notice is given or an actual nonrenewal has taken place. *See Abrams Shell v. Shell Oil Co.*, 343 F.3d 482, 489 n. 16 (5th Cir. 2003) ("[T]he Seventh Circuit rejected the *Pro Sales* approach based on a 'franchisee's ability to obtain an injunction under the PMPA' in cases of nonrenewal. We reject the *Pro Sales* approach on the same basis." (quoting *Dersch Energies*, 314 F.3d at 865)). Thus, in *Dersch Energies*, the Seventh Circuit held that a franchisee who had signed a renewal "under protest" did not have a claim for constructive nonrenewal because the

franchise had in fact been renewed. "Had Dersch allowed the defendants to issue a formal notice of nonrenewal, its dispute with the defendants would have been transformed from a mere contract dispute into a nonrenewal (within 90 days) of its franchise relationship—thus allowing it to . . . maintain suit" under the PMPA. *Id.* at 866; *accord Abrams Shell v. Shell Oil*, 343 F.3d 482, 489 (5th Cir. 2003) ("We find the Seventh Circuit's reasoning in *Dersch Energies* to be especially persuasive, thus we apply the same logic to this case. Plaintiffs have not provided any evidence that Defendants failed to renew the relevant agreements; therefore, Plaintiffs have not shown a breach in the franchise relationship.").

The plaintiffs' constructive nonrenewal argument requires the following reasoning. Had the Dealers refused to agree to the new contract terms, Motiva would have issued notices of nonrenewal alleging as a permissible basis for nonrenewal the "failure of [the parties] to agree on changes or additions to the provisions of the franchise . . . ." 15 U.S.C. § 2802(b)(3)(A). The Dealers would have asserted that the nonrenewal was improper because the changes were not offered in good faith, *id.* § 2802(b)(3)(A)(i), or else were offered in order to convert the premises to the franchisor's own control, *id.* § 2802(b)(3)(A)(ii). On those grounds the Dealers could have sought preliminary relief and damages under the PMPA. *Id.* § 2805(a) & (b).

The stumbling block that trips up the plaintiffs is that, rather than insist on receiving notices of nonrenewal, the Dealers signed the new agreements "under protest" and continued in operation under the new agreements. We conclude that just as the PMPA requires a clear indication from franchisors that they seek nonrenewal of a franchise relationship, it likewise requires that franchi-

sees faced with objectionable contract terms refrain from ratifying those terms by executing the contracts (even "under protest") and operating under them. Allowing a franchisee to sign "under protest" and then later challenge the renewal would extend the period of uncertainty through the entire first year of a contract that in this case was only three years. Recognizing constructive nonrenewal also would enable a franchisee to sign the contract and simultaneously challenge it. If its claims were rejected by the courts, the franchisee would have lost nothing and could continue to operate the franchise under the agreement with the PMPA-enforced reasonable expectation of continuation and renewal. Absent a claim for constructive nonrenewal, a franchisee must wait for a notice of termination to bring suit under the PMPA. The franchisee therefore risks the end of the franchise if the claim fails and so must carefully weigh the decision to sign or sue.[14] This is the balance Congress has struck, and should we prefer another, we would not be free to impose it. Consequently, we reject application of constructive nonrenewal to these facts.

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[14] In *Pro Sales* the suit was filed immediately and the plaintiff obtained preliminary relief so that it never operated under the new contract. This is different from *Dersch Energies*, where the plaintiff operated under the new contract "for just under a year" before filing suit. 314 F.3d at 865. The *Dersch* court noted the distinction, but found it irrelevant. *Id.* We do not address the question whether a preliminary injunction enabling the franchisee to avoid operating under the new agreement combined with an immediate suit, as in *Pro Sales*, would satisfy the requirements for bringing suit under the PMPA. Such a case would avoid several of the problems we have identified, but would still allow a franchisee to challenge an agreement as a nonrenewal while retaining the right to take advantage of that agreement should the challenge fail. We hold only that under the facts before us today we cannot recognize a claim for constructive nonrenewal.

We note with some concern the limited scope of the PMPA. Two unexpected consequences of the legislation seem to loom as potential problems. The first is that franchisors will conform their behavior to the letter of the law but still use their position of power to impose their will on franchisees. The statute is of course not a panacea and cannot be faulted for what it fails to do. But some statutory protection is worse than none when it serves as protective cover for the very misdeeds it purports to eliminate. The second unintended consequence is that, to the extent Congress succeeds in leveling the playing field, it makes the franchise arrangement less appealing to franchisors. It is not difficult to imagine protections for franchisees so strong that franchisors abandon the model entirely. Evidence introduced at trial spoke to both of these hazards. However, these are issues for Congress to weigh and remedy, not for the courts.

Because we do not recognize a claim for nonrenewal under the PMPA where the franchisee has signed and operates under the renewal agreement complained of, we vacate this portion of the district court's judgment and remand with instruction to enter judgment on this count for the defendants.

Unreasonable Gasoline Prices

The Uniform Commercial Code, as adopted in Massachusetts, contemplates the enforcement of contracts in which one party sets the price of goods over time. Mass. Gen. Laws ch. 106, § 2-305(2). But the price must be set in good faith. *Id.* The jury found that the defendants had failed to set reasonable prices in good faith. The defendants appeal on two grounds. First, they claim that the "good faith" requirement means only that such a price

may not discriminate among similarly situated buyers.[15] And second, the defendants assert that the Dealers' evidence of unreasonable pricing is inadequate as a matter of law, because 1) it was based only on retail pricing charged by competitors to the Dealers, rather than DTW prices charged to those competitors; and 2) the Dealers' expert presented pricing analysis of only one competitor, thereby failing to establish a "range" of prices outside of which the defendants' wholesale prices fell. We find neither contention persuasive.

Section 2-305(2) "rejects the uncommercial idea that . . . the seller . . . may fix any price he may wish by the express qualification that the price so fixed must be in good faith. Good faith includes observance of reasonable commercial standards of fair dealing . . . ." *Id.* § 2-305(2) cmt. 3; U.C.C. § 2-305(2) cmt. 3. "[I]n the normal case a 'posted price' or a future seller's or buyer's 'given price,' 'price in effect,' 'market price,' or the like satisfies the good faith requirement." *Id.* The defendants and amici urge us to read this comment as providing an absolute safe harbor for nondiscriminatory posted prices in open price term contracts. This we will not do.

For one thing, the very comment on which the defendants and amici rely expressly invokes the general notion of "reasonable commercial standards of fair dealing." If the comment meant that only discriminatory pricing would be disallowed it certainly could have said that. For another, it is clear to us that a situation in which one merchant is raising its prices in order to force a customer out of business is hardly the "normal case." The Eleventh Circuit allowed this question to go to a jury in a class ac-

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[15] In this assertion they are supported by amici, whose brief is gratefully acknowledged.

tion involving another oil company's pricing policies. *Allapattah Servs. v. Exxon Corp.*, 333 F.3d 1248, 1262 n.16 (11th Cir. 2003) (conceding that in a "normal case" nondiscriminatory pricing is protected, but holding that where the allegation was that an oil company was trying to drive service stations out of business, "whether this case constituted a normal case was a factual issue necessary to determine whether Exxon acted in good faith" and therefore rightly submitted to the jury). More recently, the Fifth Circuit upheld the denial of a motion for judgment as a matter of law on the basis that setting gasoline prices in bad faith to drive franchisees out of business violated the UCC. *Mathis v. Exxon Corp.*, 302 F.3d 448, 457-59 (5th Cir. 2002) ("[T]he jury's finding that Exxon breached its duty of good faith in setting the DTW price it charged the plaintiffs is not without foundation in the law or the evidence."); *see also Bob's Shell, Inc. v. O'Connell Oil Assocs.*, 2005 U.S. Dist. LEXIS 21318 (D. Mass. Aug. 31, 2005); *Wayman v. Amoco Oil Co.*, 923 F. Supp. 1322, 1349 (D. Kan. 1996) (finding that the case before it was a "normal case" but noting that "[i]f there was evidence that Amoco had, for example, engaged in discriminatory pricing or tried to run plaintiffs out of business, then the court's decision might be different"). *But see Shell Oil v. HRN, Inc.*, 144 S.W.3d 429, 435-38 (Tex. 2004) (holding absence of price discrimination created presumption of good faith notwithstanding allegations that that oil company set prices in bad faith as part of a plan to drive franchisees out of business).

Commerce is predicated on the idea that a transaction is good for both buyer and seller. The comment recognizes that allowing one party complete control over the price would be "uncommercial." We do not think the only reason for this is the risk of price discrimination. The

drafters of the UCC and amici here are rightly concerned about a flood of litigation second-guessing every price set in an open price term contract. Mere allegations of bad faith will never be enough to survive summary judgment. But this case comes to us after a jury verdict finding bad faith and commercial unreasonableness.

Nor do the defendants' objections to the sufficiency of the evidence require us to set the jury verdict aside. While perhaps more specific and more comprehensive evidence would be preferable, the jury had enough evidence of the defendants' motives and practices, as well as enough information about competitors' pricing, to come to the conclusion that the DTW prices were commercially unreasonable. Specifically, the use of competing gas stations' retail prices to draw conclusions about what those stations might be paying for gasoline is not ideal, but is adequate to the task at hand. In fact, it is the same benchmark that the defendants used in their "street-back" pricing model in setting the DTW price in the first place. In the light of this, the defendants cannot be heard to complain that such prices are not a good measure of what other distributors of gasoline are charging. And although the Dealers' expert failed to present a "range" of such prices, the expert testimony was not the only testimony available. One Dealer testified that the *retail* prices he observed were equal to or lower than the *wholesale* prices he paid. Additionally, at least one Dealer had firsthand knowledge of the DTW prices charged in the same area by another franchisor. On appeal, the defendants put forward once again the contentions of their own experts regarding the range of prices set by competitors. But it was up to the jury to choose between these competing characterizations, and the jury did so.

Damages[16]

The defendants argue that the damages awarded for the PMPA constructive termination claim are not supported by sufficient evidence. The district court instructed the jury to calculate two kinds of damages: damages in the amounts of rents paid that were in excess of the rents under the Subsidy, and damages for reduction in the values of the Dealers' businesses. We agree with the district court that there was ample evidence in the record for the jury to make a damages award, and we uphold that award as reasonable.

The defendants claim that the damages are not supported by sufficient evidence for two reasons. First, the plaintiffs' expert used the VRP when calculating damages for excess rent, rather than the STIP, as would have been correct. Because the STIP was less generous, the expert's figures were probably too high. And second, the expert presented damages figures for lost business value, but those figures were based on excess rent paid under the new leases, not on the elimination of the Subsidy. Because this testimony applied properly only to damages under the constructive *nonrenewal* claim, the defendants say that a correspondence between the expert's figures and the actual awards for lost business value awarded under the constructive *termination* theory must be error. We address each of these in turn.

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[16] Damages for the state contract claim duplicate those for constructive termination under the PMPA. We discuss these damages only once, under the PMPA. Also, because we vacate the jury's verdict on the constructive nonrenewal claim, we do not consider the damages awarded under that claim. For the same reason, we do not address the defendants' argument on appeal that the awards for constructive termination and constructive nonrenewal were duplicative.

The judge instructed the jury to find damages for excess rent paid due to the elimination of the Subsidy and for the loss of value to the Dealers' businesses due to the increased rent and the higher gasoline prices.

Calculation of excess rent requires several predictions: of the Subsidy threshold amount, of the discount rate, and of how much gasoline the Dealers could have sold under the scheme. Aside from those assumptions it is a relatively certain calculation, on which expert testimony was received.[17] The Dealers' damages expert concededly used the VRP instead of the STIP to calculate damages, thereby potentially inflating the damages. But even if we could state with certainty that the damages were therefore inaccurate, that would not necessitate our remanding for a new damages calculation or our settling the matter ourselves. A clock that is five minutes fast is, strictly speaking, wrong. But it still may give a general sense of the time and thereby serve its purpose. And the damage figures provided by the expert are, after all, only guideposts for the jury.

Calculating the loss of business value, on the other hand, relies on many more intangible factors and requires many more assumptions. In this respect it is similar to calculating future lost profits, which we have previously held is a more speculative inquiry than normal economic damages calculations. *See, e.g., Camar Corp. v.*

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[17] Even this normally simple calculation is complicated somewhat in these circumstances. Higher rents may have forced the Dealers to maintain higher gasoline prices, which in turn might have lowered sales volume. The Subsidy reduced rents based on gasoline volume, so a change in that volume would render more uncertain even the damages on this element. (At least one of the Dealers testified that he would sometimes lower his gasoline prices because he could recoup the lost margin based on increased volume and the lowered rent provided by the Subsidy based on that volume.)

Preston Trucking Co., 221 F.3d 271, 279 (1st Cir. 2000) ("[M]athematical precision is not required in calculating lost profits" but "a damages award must have a rational basis in the evidence." (internal quotation omitted)); *E. Mountain Platform Tennis v. Sherwin-Williams Co.*, 40 F.3d 492 (1st Cir. 1994) (upholding as not erroneous a jury's award of future lost profits where the company was only "at a break-even point" and operations were not yet profitable). We reject the defendants' comparison of this case to *Kolb v. Goldring*, 694 F.2d 869, 873 (1st Cir. 1982). That case dealt with lost wages, in a statutory setting that limited recovery to "accounts owing" on a similar footing as a "common law suit for back wages for breach of contract." *Id.* at 871-82. Here, the plaintiffs are entitled to the loss of the value of their business as a result of the defendants' actions.

Because that calculation is necessarily complex and uncertain, we require from the jury less rigor in making the award. Here, along with expert testimony, the Dealers presented testimony that the defendants themselves had valued these stations more highly before the elimination of the Subsidy, and that some of the franchises had lost substantial value. We recognize the wide latitude afforded the jury in this situation—asked to make an uncertain calculation on little hard evidence—and we are mindful that we review to see only if no rational jury could have made this award. "[T]he assessment of damages cannot be disturbed unless the award exceeded any rational appraisal or estimate of the damages that could be based upon the evidence or was grossly excessive, inordinate, shocking to the [conscience] of the court, or so high that it would be a denial of justice to permit it to stand." *Consolo v. George*, 58 F.3d 791, 795 (1st Cir.

1995) (quotation marks and citations omitted). We decline to go so far.

The jury's awards largely correlate with the figures put forward by the Dealers' damages expert. We believe, as did the district court, that once the weaknesses in the expert's figures were pointed out in closing arguments and jury instructions, the jury nonetheless was free to use them as markers of probable damages. That the jury adhered closely to these numbers does not change the fact that the jury was aware of their inadequacies. The jury may have decided that they were close enough, or that no other method of calculation would be better. While a jury is not free "to pull figures out of a hat," *Kolb*, 694 F.2d at 873, we believe that the expert's testimony, the availability of the expert's background data, and the cautionary instruction issued by the district court gave enough guidance to the jury.

And the jury did not simply parrot the expert's figures in any event. In fact, where the jury *did* depart from the experts' figures, the defendants attack those departures as aberrations deserving of reversal. Three Dealers received awards in excess of the damage expert's calculations. The defendants characterize these as mystery "bonus" amounts unsupported by any view of the evidence. But each of these three Dealers testified to particular hardships that the jury might have thought indicated special reductions in business value. The jury may well have been performing its function in calculating losses in business value stemming from those hardships.

Similarly, we find that the jury had ample evidence to make a damages award for the claim under the open price term of the gasoline supply contract. That it differed in some particulars from the numbers put forward by the expert is immaterial, particularly where, as here,

different forms of evidence showed different pieces of this picture.

The award of attorneys' fees is mandated by the PMPA. Because we uphold only one of the two statutory claims, however, we must remand for a determination whether the failed constructive nonrenewal claim was a "severable" claim for the purpose of awarding attorney's fees. Such fees are normally not recoverable. *See Figueroa-Torres v. Toledo-Dávila*, 232 F.3d 270, 278 (1st Cir. 2000) (fees for unsuccessful severable claims normally not recoverable); *Coutin v. Young & Rubicam, P.R.*, 124 F.3d 331, 339 (1st Cir. 1997) (discussing framework for determining whether to reduce fees); *see also Hensley v. Eckerhart*, 461 U.S. 424 (1983). We are mindful both of the district court's discretion in this matter, and of the Supreme Court's admonition that determination of attorney's fees should not result in a second major litigation. *Hensley*, 461 U.S. at 437. But we have no basis here on which to make a judgment, and so we must remand.

Conclusion

The judgment of the district court on the state contract claims, the unreasonable gasoline pricing claims, and the constructive termination claims is **affirmed**. The judgment on the constructive nonrenewal claims is **reversed**. The jury awards as to the surviving claims are **affirmed** as rational awards supported by sufficient evidence. The award of attorney's fees and costs is **vacated** and **remanded** for reconsideration in the light of our mixed disposition of the claims under the PMPA. Costs on appeal are awarded to the appellees.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 05-2771

FRANCIS MARCOUX, [ET AL.],
Plaintiffs,

CYNTHIA KAROL; SID P[RA]SHAD; JOHN A. SULLIVAN; MAC'S SHELL SERVICE, INC.; RAM CORPORATION, INC.; J&M AVRAMIDIS, INC.; AKMAL, INC.; THREE K'S, INC.; STEPHEN PISARCZYK,
Plaintiffs-Appellees,

v.

SHELL OIL PRODUCTS COMPANY LLC; MOTIVA ENTERPRISES LLC; SHELL OIL COMPANY, INC.,
Defendants-Appellants.

Before Boudin, Chief Judge, Torruella, Lynch, Lipez and Howard, Circuit Judges, Delgado-Colon,* District Judge.

ORDER OF COURT

Entered: May 23, 2008

The petition for rehearing having been denied by the panel of judges who decided the case, and the petition for rehearing en banc have been submitted to the active

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* Of the U.S. District Court for the District of Puerto Rico, sitting by designation.

judges of this court and a majority of the judges not having voted that the case be heard en banc, it is ordered that the petition for rehearing and the petition for rehearing en banc be *denied.*

By the Court:

/s/ Richard Cushing Donovan, Clerk

Nos. 08-240 and 08-372

In The Supreme Court of the United States

MAC'S SHELL SERVICE, INC., ET AL.,

Petitioners,

v.

SHELL OIL PRODUCTS COMPANY LLC, ET AL.,

Respondents.

SHELL OIL PRODUCTS COMPANY LLC, ET AL.,

Petitioners,

v.

MAC'S SHELL SERVICE, INC., ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF FOR MAC'S SHELL SERVICE, INC., ET AL.

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QUESTIONS PRESENTED

The Petroleum Marketing Practices Act ("PMPA" or "Act"), 15 U.S.C. §§ 2801-2807, regulates the grounds and manner on which a petroleum refiner must "terminate" or "nonrenew" a service station "franchise." The Act prohibits refiners from terminating or failing to renew a franchise in order to convert a franchise-operated station to a direct operation.

The jury found that Shell Oil Company ("Shell") and others formed a joint venture (Motiva Enterprises, LLC ("Motiva")) to circumvent the Act's restrictions, force franchisees out of business, and convert their stations to company-owned stations. The jury concluded that the franchises were "constructively terminated" when Shell assigned the franchise to Motiva which breached the station leases by ending a rent subsidy that caused such a material increase in monthly rent that it "effectively ended" the lease. The jury also determined that renewal leases offered by Motiva contained new terms that were adopted for the purpose of forcing the franchisees not to renew thereby causing a "constructive nonrenewal" of the franchise relationship.

QUESTIONS PRESENTED – Continued

The questions presented are:

1. Whether a franchisee has a cause of action under the Act where, following an assignment of the franchise, the assignee causes a material breach of one of its statutory elements effectively ending the original franchise (No. 08-372).

2. Whether a franchisee has a cause of action under the Act where the franchisee signs the renewal franchise agreement under protest believing that the agreement contains new terms adopted in bad faith and for the purpose of forcing the franchisee not to renew (No. 08-240).

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, neither Mac's Shell Service, Inc., Akmal, Inc., RAM Corporation, Inc., nor J&M Avramidis, Inc. have any parent corporation, nor are there any publicly traded companies that own more than ten percent of their stock.

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STATEMENT OF THE CASE

I. Statutory Framework

Legislative History. Congress enacted Title I of the PMPA to address the exploitation of independent gasoline dealer franchisees and to ensure their reasonable expectations of a continuing franchise relationship. S. Rep. No. 731, 95th Cong., 2d Sess. (1978), *as reprinted in* 1978 U.S.C.C.A.N. 873, 874 ("S. Rep."); Comment, *Judicial Interpretation of the Petroleum Marketing Practices Act: Conflict and Diversity*, 32 Emory L. J. 273 (1983) (*Judicial Interpretation*). The record before Congress disclosed wide-spread terminations and nonrenewals of the franchises of independent gasoline retailers and distributors resulting from the great disparity in bargaining power between franchisors and franchisees. S. Rep. at 17. Congress recognized that franchisors took advantage of that disparity in bargaining power to threaten termination and nonrenewal, gain an unfair advantage in contract disputes, and compel compliance with marketing policies, creating a continuing vulnerability on the part of the franchisee to the demands and actions of the franchisor. *Id.* Thus, Congress acted to level the playing field and "to protect franchisees from overbearing, burdensome conduct by the franchisor during the term of the franchise." *Barnes v. Gulf Oil Corp.*, 795 F.2d 358, 362 (4th Cir. 1986).

Congress recognized that franchisees risked "losing completely the return from their prior

investments, and potentially their livelihood, if their franchise agreements are terminated." *O'Shea v. Amoco Oil Co.*, 886 F.2d 584, 587 (3d Cir. 1989). Through the Act, Congress sought to "prevent a franchisor from taking over a successful station operation and appropriating the benefit of the goodwill that the franchisee had developed." *Veracka v. Shell Oil Co.*, 655 F.2d 445, 448 (1st Cir. 1981); *Slatky v. Amoco Oil Co.*, 830 F.2d 476, 482-483 (3d Cir. 1987) (Act reflects Congress's concern that major distributors' desire to operate their own stations results in pressing franchisees to sell out or face stiff increases in rent); *Judicial Interpretation, supra* at 279-283. Congress observed, "The prospect of non-renewal for arbitrary or discriminatory grounds threatens the independence of the franchisee as a competitive influence in the marketplace." S. Rep. at 18; *Barnes*, 795 F.2d at 360 (Congress acted to promote competition within the industry).

Statutory Structure. Section 2802(a) of the Act explicitly prohibits the termination of a "franchise"[1] or nonrenewal of a "franchise relationship"[2] except for

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[1] A franchise consists of three elements: a "contract" to use the refiner's trademark, a "contract" for the supply of motor fuel, and a "lease" of the service station. It also includes the "unexpired portion" of a franchise validly assigned under "State law." 15 U.S.C. § 2801(1)(B)(i)-(iii).

[2] A franchise relationship means the respective motor fuel marketing or distribution obligations and responsibilities of a franchisor and franchisee which result under the franchise. 15 U.S.C. § 2801(2).

specific limited grounds and conditions set forth in section 2802(b)(2) and (3). Franchisors must also satisfy specific notice requirements. *See* 15 U.S.C. §§ 2802(b)(1)(A), 2804.

A franchisee may maintain a civil action "[i]f a franchisor fails to comply with the requirements of section 2802 [addressing terminations and nonrenewals], 2803 [concerning trial and interim franchises], or 2807 [restrictions on installation of renewable fuel pumps] of this title." 15 U.S.C. § 2805(a). In addition to compensatory and potential punitive damages, the Act empowers courts to grant such equitable relief "as the court determines is necessary to remedy the effects of any failure to comply with the requirements of sections 2802, 2803, or 2807 of this title, including declaratory judgment, mandatory or prohibitive injunctive relief, and interim equitable relief." *Id.* § 2805(b)(1). The court may also grant a preliminary injunction upon a proper showing. *Id.* § 2805(b)(2). While franchisees ultimately bear the burden of proof to establish termination of the franchise or nonrenewal of the franchise relationship within the meaning of the Act, the franchisor bears the burden to establish as an affirmative defense compliance with the Act's requirements. *Id.* § 2805(c).

Each of the grounds for termination and nonrenewal are limited by specific conditions and time limitations. S. Rep. at 33 ("Specific conditions are attached to each of these grounds, including time limitations which are imposed to preclude a franchisor from basing termination or non-renewal upon

old and long forgotten events."). In addition to prohibiting terminations or nonrenewals based on stale complaints, terminations or nonrenewals cannot be based on unreasonable or immaterial franchise provisions. 15 U.S.C. § 2802(b)(2)(A). Franchisees must be advised in writing of alleged failures to carry out provisions of the franchise and afforded reasonable opportunities to carry out the provisions, and any failure must thereafter continue within certain time frames. *Id.* § 2802(b)(2)(B). Reasons for termination or nonrenewal not identified in the Act (as an event making termination or nonrenewal reasonable) are to be carefully scrutinized. S. Rep. at 34.

The Act expressly prohibits a franchisor from attempting to convert the marketing premises to direct operations by its employees or agents. This prohibition is expressed three times in the Act: in section 2802(b)(2)(E), where the franchisor seeks to withdraw from marketing gas in the franchisee's area; section 2802(b)(3)(D)(ii), where the franchisor alters, adds to or replaces the leased-marketing premises or otherwise determines that renewal would be uneconomical; and section 2802(b)(3), where the franchisor and franchisee fail to agree on changes or additions to the terms of the franchise.[3]

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[3] The prohibition in section 2802(b)(3) also applies to any failure to agree on terms where the underlying motive is to "prevent[ ] the renewal of the franchise relationship." 15 U.S.C. § 2802(b)(3)(A)(ii).

The Act preempts any state law that attempts to regulate the grounds for termination or the notice requirements unless they are the same as the Act. *Id.* § 2806(a). Congress, however, intended the Act's preemption to be limited. S. Rep. at 42-43. In 1994, when Congress amended the Act to "affirm and clarify" the Act's provisions, it "reconfirm[ed] the original intent that preemption is limited in scope." H.R. Rep. No. 103-387, 103d Cong., 2d Sess. (1994) at 4.[4] What was preempted, Congress noted, was the grounds for termination and nonrenewal, the notice provisions and the standard (good faith and in the ordinary course of business) used to assess franchisor conduct. S. Rep. at 19.

The Act recognizes the interplay of state law with its provisions and requirements. The 1994 Amendments added that the definition of "failure" in section 2801(13) did not include: "(C) any failure based on a provision of the franchise which is illegal or unenforceable under the law of any State (or subdivision thereof)." At the same time, Congress added a new

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[4] Title I was amended in 1994 (Pub. L. 103-371, 108 Stat. 3484) to "affirm and clarify" certain provisions of the Act by adding certain additional protections for franchisees ("1994 Amendments"). Congress noted that "[d]uring the 16 years since the PMPA was enacted, the provisions of Title I have been . . . the subject of many judicial interpretations. The Committee believes that further direction is desirable in order to assure that the PMPA is consistently and clearly understood and interpreted." H.R. Rep. No. 737, 1994 WL 530965, 1994 U.S.C.C.A.N. 2779. *See also* S. Rep. No. 103-387 at 2, 103d Cong., 2d Sess. 1994 WL 5347750 (same).

provision which prohibits franchisors from requiring a franchisee to release or waive "any right that the franchisee may have under any valid and applicable State Law" and invalidates any provision that specifies that the interpretation and enforcement of the franchise shall be governed by the law of any state other than the state where the franchisee has its principal place of business. 15 U.S.C. § 2805(f). The amendments also added a prohibition against any state law that requires a payment for the goodwill of a franchisee on termination or nonrenewal authorized by the Act. *Id.* § 2806(a)(2).

The Act does not authorize or prohibit assignments, but leaves the validity of an assignment of the franchise to state law. *Id.* § 2806(b)(1). The Act recognizes, however, that state law governing the validity of an assignment may impact the "franchise," which is defined to include the "unexpired portion of any franchise" transferred or assigned as authorized by state law. *Id.* § 2801(1)(B)(iii). Congress left conflicts between the Act and state law to be resolved by the court through general principles of equity, recognizing that "no single statutory principle would be flexible enough to deal with so wide a range of potential conflicts." S. Rep. at 43.

II. Proceedings Below

A. Background

The theory of the case presented at trial was that Shell and Motiva devised a secret plan to take over

operation of their franchises without paying fair value and to circumvent the Act's restrictions on terminations and nonrenewals. J.A. 55-87; 450.[5] The franchise agreement between Shell and the dealers specified a "contract rent" for the use of the Shell-owned service stations.[6] From the start of the relationship, however, Shell told the dealers to "disregard[]" the contract rent, that rent would be calculated using a "permanent" rent subsidy, and that they should plan their businesses around its continued availability. J.A. 431, 444; C.A. App. 1509, 3727-3729. The amount of the subsidy was based upon the volume of gasoline sold. J.A. 430-431. Internal Shell documents confirmed that the subsidy would continue "indefinitely" and dealers were told that notices from

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[5] Separate actions brought by franchisees doing business in Massachusetts, New Hampshire, and Rhode Island were consolidated for pre-trial purposes pursuant to 28 U.S.C. § 1407 in the District of Massachusetts. *In re Shell Oil Prods. Co. Dealer Franchise Litig.*, 206 F. Supp. 2d 1373 (J.P.M.L. 2002). The district court selected ten Massachusetts plaintiffs to proceed with a first phase of discovery and to trial. Of the ten initial plaintiffs, one plaintiff settled his claims and another lost on summary judgment. Plaintiff Mac's Shell operated two stations. Thus, eight plaintiffs operating nine stations proceeded to trial. J.A. 432. The eight trial plaintiffs are referred to as the "dealers." The claims of the remaining Massachusetts, New Hampshire and Rhode Island franchisees were stayed and eventually settled.

[6] The two separate contracts – a lease and a supply agreement addressing fuel supply and trademark rights are referred to collectively as the "franchise agreement." J.A. 239-267; C.A. App. 1395-1410.

Shell that permitted the cancellation of the subsidy upon thirty days notice would only apply in the event of "war or an oil embargo." J.A. 431; C.A. App. 874; 1009-1010; 1858, 1998, 2047, 2101. For nearly two decades, the subsidy was used to calculate monthly rent and as a "tool" to perform the primary function of the franchise: selling gasoline. J.A. 431. The subsidy was "essential" to the dealers' businesses and their decisions to invest time and money into their franchises. J.A. 443; C.A. App. 837, 841, 845, 851, 873-875, 899, 943-944, 964, 975, 997, 1009-1010, 1071.

In the late 1990s, Shell concluded that it could earn greater profits if it converted its franchise stations to company-operated stations. C.A. App. 3646.[7] Paying franchisees fair compensation for their businesses, however, was cost prohibitive.[8] The "restrictions" on franchise terminations and nonrenewals imposed by the Act stood as another impediment which needed to be "overcome." C.A. App. 1530-1533, 1512-1578, 3643-3645. Unwilling to negotiate a buy-out of the franchisees' businesses, Shell devised a plan to force its franchisees out of business. These

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[7] Converting to company operated stations would permit the franchisor to set the retail price for gasoline, which it could not otherwise do. C.A. App. 3646.

[8] One estimate put the cost of purchasing franchisee goodwill at several hundred million dollars. C.A. App. 1512-1578, 2638-2824.

facts are largely ignored by Shell, Motiva, and the Solicitor in their briefs.

Shell and other joint venture partners created Motiva. J.A. 430; C.A. App. 2476-2477. Shell transferred its "marketing assets" and assigned the franchise agreements to the newly formed entity. J.A. 430, 447-448; C.A. App. 2476-2477, 3589, 3715. Motiva eliminated the subsidy, which it knew would cause dramatic increases in rent and other economic harm to the dealers' businesses. J.A. 431; C.A. App. 1150, 1161-1162, 3635-3636. As the term of the Shell leases ended, Motiva presented the dealers with new leases on a "take-it-or-leave-it" basis. C.A. App. 3607-3608, 866. Those leases had additional rent increases and other terms that were designed to discourage the dealers from renewing and to enable Motiva to convert the franchise-operated stations to direct operations. J.A. 375, 382. Motiva expected that the new terms would result in the "closure" of franchise stations. J.A. 375; C.A. App. 3615-3616. If the dealers did not sign the leases, Motiva stated it would not renew the franchise. C.A. App. 976, 999, 2113-2116, 2158-2159, 2161-2162.[9] The dealers – through counsel – protested the new terms, reserved their rights to

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[9] Motiva envisioned that the transition to direct operations would take four to five years to achieve. C.A. App. 3628. Within five years of Motiva's formation, the number of franchise-operated stations in Massachusetts decreased from 177 to 96 while the number of company-operated stations increased from 3 to 40. C.A. App. 941; 2164-2165.

challenge the legality of the renewal leases, brought suit, and then signed the leases under protest. J.A. 129-131, 450.[10]

The economic burden caused by the higher rent forced one dealer to simply "walk-away" from his station without compensation. C.A. App. 1013. Two other dealers sold their businesses below market value. C.A. App. 882-884, 978. A fourth contemplated bankruptcy, but kept afloat by borrowing money and cashing in retirement accounts, C.A. App. 847-851, while another dealer relied upon the assistance of family members who worked without pay. C.A. App. 1001. Two other dealers managed to remain in business by relying upon profits earned from ancillary businesses. C.A. App. 950-961, 917.

B. Jury Findings

The dealers pursued two separate claims arising under the Act. First, the dealers claimed that their Shell franchises were "constructively terminated" when the leases were assigned to Motiva and the subsidy was eliminated. Based upon the oral "representations" made to the dealers, internal Shell

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[10] All but one of the dealers signed their Motiva lease *after* the dealers had filed an initial complaint in a "related" matter, *Tsanikilides, et al. v. Shell Oil Prods. Co., Inc., et al.*, No. 00-11295, in the United States District Court for the District of Massachusetts on June 30, 2000. Each of the dealers was a plaintiff in *Tsanikilides*. J.A. 268-269, 310-325, 330-331, 431-432, 440; Pet. Br. at 11, n. 7.

documentation showing that "franchisees would understand the loss of the subsidy to be a breach of a promise by Shell," and a course of "conduct," the jury determined that the Shell leases included the subsidy. J.A. 376-377, 443-444; C.A. App. 1303-1304, 1309. The jury concluded that the elimination of the subsidy "was such a material change that it effectively ended their leases, even though the [dealers] continued to operate their business," and caused a "constructive termination" of the franchises. J.A. 373, 379-380, 449-450. Second, the dealers alleged that the renewal leases offered by Motiva contained additional rent increases and other onerous terms that were not adopted in "good faith," as required by the Act, but rather were part of the plan to drive the dealers out of business. J.A. 450. The jury determined that the rent increases were designed to discourage the dealers from renewing and enable Motiva to convert their stations to direct operations, and amounted to a "constructive nonrenewal" of the franchise even though the dealers signed new leases. J.A. 374-375, 382.

The jury found Motiva and Shell liable on all counts to all dealers and awarded $1.3 million in damages for the constructive termination claim which included the value of the lost subsidy and related losses in business value. J.A. 376-386, C.A. App. 1304. It awarded an additional $1.2 million for the constructive nonrenewal claim which reflected the amount of rent Motiva charged above "industry standard" as well as related losses in business value. J.A.

376-386; C.A. App. 1306. The jury also found that Shell and Motiva violated various state or common law provisions and awarded additional damages for those breaches.

C. Proceedings in the Court of Appeals

The court of appeals affirmed in part and reversed in part. J.A. 429-462.

1. Addressing the dealers' "termination" claim, the court of appeals held that a franchisee establishes a claim under the Act where an assignment leads to the breach of one of the statutory elements of the "franchise" (*i.e.*, the contract to use the refiner's trademark, the contract for the supply of motor fuel, or the lease of the service station). J.A. 444-445.[11] Although the court did not hold that "any material breach of the lease would necessarily be sufficient," it stated that the district court had set an "appropriate threshold" by requiring a "breach of the lease [that] 'was such a material change that it effectively ended the lease, even though the plaintiffs continued to operate the business.'" J.A. 447. The court held that there was "ample evidence" for the jury to conclude that the assignment of the franchise to Motiva and the elimination of an "essential" part of the lease – the subsidy – marked the "end of the relationship"

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[11] The court also held that an assignment which violates state law gives rise to a claim under the Act. J.A. 444.

and caused a "constructive termination" of the franchise. J.A. 443, 449-451.

The court agreed with the Fourth Circuit's holding in *Barnes* that an action for constructive termination lies against the assignor of the franchise when the assignee breaches the lease. J.A. 446. This, the court noted, prevents the assignor/franchisor from "shielding itself against liability" through the use of another corporation or, in this case, "a joint venture" in which the assignor is a party. J.A. 446 citing *Barnes*, 795 F.2d at 362. The Act simply does "'not contemplate that a franchisee should be relegated to seeking damages from an assignee that might not have the resources to satisfy a judgment.'" J.A. 446 quoting *Barnes*, 795 F.2d at 362. To hold otherwise, the court concluded, would permit a franchisor to "circumvent[ ]" the protection afforded by the statute by the "simple expedient of assigning the franchisor's obligations to an assignee who increases the franchisee's burdens. . . ." J.A. 444 quoting *Barnes*, 795 F.2d at 362.

The court of appeals rejected Shell and Motiva's argument that the breach must result in a total loss or end of one of the statutory elements of the franchise[12] and dubbed the franchisors' efforts to liken a

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[12] While Shell and Motiva argued to the court of appeals, as they do here, that a complete loss or end of one of the statutory elements of the franchise is a prerequisite to a claim under the Act, they did not object to a contrary jury instruction and failed to raise this argument in their motion filed pursuant to Fed. R.

(Continued on following page)

constructive claim under the Act to constructive claims in other areas of law "misleading." J.A. 446. "[S]unk costs, optimism, and a habit of years," the court reasoned, might lead a small businessperson to try to make the new arrangement work, "even where the terms changed so materially as to make success impossible." J.A. 446-447. Indeed, the court noted that after the elimination of the subsidy, many dealers testified that they had "gone into personal debt, driven themselves into bankruptcy, or enlisted the aid of family members working without pay" in an attempt to survive. J.A. 447. Agreeing with the Ninth Circuit's decision in *Pro Sales, Inc. v. Texaco, U.S.A.*, 792 F.2d 1394, 1399 (9th Cir. 1986), the court declared that the "'congressional plan would be frustrated by requiring a franchisee to go out of business before invoking the protections of the PMPA.'" J.A. 447. For this reason, the court held "[w]here a franchisor has breached its obligations to the franchisee such that the franchisee faces the effective end

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Civ. P. 50(a). C.A. App. 118-124. The jury was charged that it could find a constructive termination if the elimination of the subsidy was "such a material change that it effectively ended the lease, even though the plaintiffs continue to operate their business." J.A. 373. Shell and Motiva's counsel endorsed the instruction ("I thought the overall instruction was fine."). C.A. App. 1308. Having failed to object to the jury charge or raise this issue in the Rule 50(a) Motion, the dealers argued to the court of appeals that Shell and Motiva had waived their right to advance a new legal standard on appeal. *Robles-Vazquez v. Garcia*, 110 F.3d 204, 206 n.5 (1st Cir. 1997). The First Circuit did not address the waiver argument in its opinion.

of the franchise, the [Act] must treat that as a termination of the franchise." J.A. 449.

2. The court below noted that the Act is concerned not only with franchise terminations, but also with a franchisor's failure to renew a franchise agreement when it expires because the "reasonable expectations of the parties to a motor fuel franchise are that the relationship will be a continuing one." J.A. 434, n. 2 quoting S. Rep. at 18. Accordingly, the Act forbids "franchisors using their power to dictate impossible franchise terms in order to force the franchisees to walk away from their investments or to sell them at artificially low prices." J.A. 449, n. 13. Nevertheless, the court of appeals rejected the dealers' constructive nonrenewal claim, holding that, procedurally, the Act "requires [a franchisee] faced with objectionable contract terms [to] refrain from ratifying those terms by executing the contracts (even 'under protest') and operating under them" and offers relief for a franchisor's improper conduct only upon the franchisor's issuance of a notice of nonrenewal. J.A. 452-453. In other words, a dealer presented with a questionable lease must either sign the lease and forgo the claim that the lease violates the Act, or refuse to sign, wait for a notice of nonrenewal and risk the franchise on the chance that a district court will issue injunctive relief. J.A. 450, 453.

The court of appeals' reluctance to recognize a constructive nonrenewal rested on its belief that the Act's "notice-and-preliminary-relief structure" reflected Congressional intent "to limit the reach of the

PMPA to cases where either a notice is given or an actual nonrenewal has taken place." J.A. 451. The court observed that a notice of nonrenewal itself was "not strictly speaking a nonrenewal," but nevertheless must be treated as the "'equivalent of a nonrenewal,'" J.A. 450 quoting *Dersch Energies, Inc. v. Shell Oil Co.*, 314 F.3d 846, 864 (7th Cir. 2002), even though the franchisor may "rescind" the notice at any time before it becomes effective. J.A. 451 citing *Seckler v. Star Enter.*, 124 F.3d 1399, 1403 (11th Cir. 1997). Had the dealers received a notice of nonrenewal, the Act would have permitted them to file suit and seek injunctive relief. J.A. 450-452 quoting *Lippo v. Mobil Oil Corp.*, 776 F.2d 706, 720 (7th Cir. 1985). The court refused to follow the holding in *Pro Sales,* which recognized a claim for constructive nonrenewal where the franchisee signed its renewal lease "under protest" and immediately brought suit under the PMPA. J.A. 451.

SUMMARY OF ARGUMENT

In this case, the jury determined that Shell and Motiva engaged in a concerted effort to take over successful service station franchises without compensating the franchisees for what they had built. Shell and Motiva sought to accomplish this objective by the unilateral imposition of onerous and intolerable terms and conditions intended to force the termination of existing franchise agreements or to make renewals of those agreements a financial impossibility for the

franchisees. Motiva and Shell's conduct in this matter is the poster child for Congress's enactment of the PMPA years earlier.

The principal practical question presented in this case is whether Motiva and Shell's pursuit of its objectives is subject to the PMPA's remedies before these objectives are achieved and before the service station owners are simply out of luck and out of business. The textual linguistic question presented is whether Motiva and Shell's attempts to force terminations and nonrenewals by its deeds but not its words is proscribed by the PMPA.

The dealers believe that the plain language and intent of the Act equally prohibit this conduct and provides a remedy for them. Section 2802 of the Act establishes procedures and criteria for the termination or nonrenewal of franchises. Section 2805 subjects a franchisor's failure to comply with these requirements to an action for damages, injunctive and other relief. This section contemplates pre-termination and pre-nonrenewal relief where necessary.

Shell and Motiva did not follow the prescribed procedures or provide the required notice. Nor did they seek termination and nonrenewal for the permissible reasons outlined by the Act. Instead, they pursued their objectives of termination and nonrenewal under cover of perceived loopholes in the statute. Whether or not this behavior is called "constructive" termination or "constructive" nonrenewal, it is behavior that

is proscribed by the Act and it is behavior that violates the specific criteria and notice provisions of the Act. The Act's remedies should be available in this setting. Those remedies cannot be circumvented under any theory of statutory construction where, as here, the franchisor proceeds on a course of termination or nonrenewal and simply ignores the obligations imposed by the PMPA.

Shell and Motiva's plain language argument is misleading and out of context. Shell and Motiva committed and intended to commit the prohibited acts and no manipulation of the relevant language suffices to make that conduct innocent. The aids to construction relied on by Shell and Motiva and the Solicitor are not persuasive. If some constructive consequences are sufficient to sustain a cause of action and some are not, then Motiva and Shell and the Solicitor have not made a compelling case that Motiva and Shell's behavior in this case is more analogous to the non-actionable constructive effects than to the actionable ones. An opposite conclusion makes far more sense. Congress knew what conduct it intended to sanction and Shell and Motiva surely engaged in that prohibited conduct. The remedy afforded the franchisees for Shell and Motiva's attempt to terminate their franchises is appropriate for this reason.

The court of appeals erred, however, in withholding a remedy for an illegal nonrenewal under the facts found by the jury. The decision of the franchisees to sign renewal documents under protest

while the PMPA suit was pending does not support an argument that they renewed and thus are barred from a claim based on an illegal nonrenewal. Shell and Motiva's bad faith in presenting the renewals and their knowledge that the renewals, if signed, would not allow the dealers to preserve their franchises is well established. The PMPA's protections and remedies should not be so easily undermined by Shell and Motiva's clever strategy. The Act does not accommodate this strategy by its language or structure or intent and the Court should not condone it.

Finally, the Solicitor and amici's concern that allowing the dealers to prevail unfairly prejudices the franchisors when, as a matter of good business judgment, a franchisee deserves to be terminated or nonrenewed is not credible. The franchisees here were succeeding, not failing, and Shell and Motiva wanted to usurp that success for its own benefit. The allowance of a cause of action for the dealers in these cases does not in any way unfairly prejudice franchisors from following the statutory requirements for terminating or nonrenewing franchisees that are not performing. The Court should rule accordingly.

ARGUMENT

I. THE ACT'S LANGUAGE, DESIGN AND PURPOSE RECOGNIZE A CLAIM FOR CONSTRUCTIVE TERMINATION (No. 08-372)

Shell and Motiva construe the PMPA's use of the word "terminate" to mean that a dealer may not invoke the statute's protection unless one of the statutory elements of the franchise – the "contract" to use the refiner's trademark, the "contract" for the supply of motor fuel, or the "lease" of the service station – has come to an end. Petitioners' Brief ("Pet. Br.") at 24; 15 U.S.C. § 2801(17). This theory assumes that a franchisor's attempt to terminate, even if predicated on grounds or in a manner proscribed by the statute, is not actionable unless the attempt results in the loss of one of these elements. The Act's language, design and purpose demonstrate that the protection Congress afforded to dealers under the PMPA is not conditioned upon such a loss.

Section 2805(a) – which contains the statute's enforcement provisions – confers a right of action upon a dealer whenever the franchisor "fails to comply" with any provision of section 2802. 15 U.S.C. § 2805(a). A district court is authorized to enjoin any attempt to terminate or nonrenew the franchise that does not comply with the statute and to "grant such equitable relief as the court determines is necessary to remedy the effects of any failure to comply. . . ." *Id.* § 2805(a)(1)-(2), (b)(1). The purpose of injunctive relief is to prevent a termination or nonrenewal where the dealer has raised "sufficiently serious questions going

to the merits" of the termination or nonrenewal. *Id.* § 2805(b)(2)(ii). To accept Shell and Motiva's view of the statute would render the enforcement mechanism meaningless. A court cannot enjoin a franchisor from unlawfully terminating a franchise that has already ended.

A. The Act Authorizes a Dealer to Seek Redress Whenever the Franchisor Fails to Comply with the Requirements of Section 2802 and Vests the Court with Equitable Powers to Remedy Any Such Failure

1. In determining the meaning of a statute, the Court "look[s] not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy." *Dada v. Mukasey*, 128 S.Ct. 2307, 2317 (2008) (citation omitted). Words taken in isolation do not control statutory construction. *Dolan v. Postal Serv.*, 546 U.S. 481, 486 (2006) ("A word in a statute may or may not extend to the outer limits of its definitional possibilities. Interpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis."). *See also United States v. Campos-Serrano*, 404 U.S. 293, 298 (1971) ("If an absolutely literal reading of a statutory provision is irreconcilably at war with the clear congressional purpose, a less literal construction must be considered.").

The Act's enforcement provisions make any failure of the franchisor "to comply with the requirements" of section 2802 actionable, and does not restrict the franchisee's cause of action only to situations where the franchise has come to an end. 15 U.S.C. § 2805(a). That Congress did not intend to so restrict the cause of action is confirmed by the language used in the very same section to frame the claim's limitations period: "[N]o action may be maintained unless commenced within 1 year after the later of (1) the date of termination of the franchise or nonrenewal of the franchise relationship; or (2) the date the franchisor fails to comply with the requirements of section 2802, 2803, or 2807 of this title." *Id.* § 2805(a). Had Congress intended to restrict a franchisee's cause of action to circumstances where the franchise had ended, the language in section 2805(a)(2) would have been unnecessary and irreconcilably in conflict with section 2805(a)(1).

The Act prohibits a franchisor from terminating or nonrenewing a franchise, 15 U.S.C. § 2802(a), unless the franchisor does so pursuant to one of the grounds enumerated in the statute, *id.* § 2802(b)(2)-(3), and provides notice to the franchisee of its "intention" to terminate or nonrenew the franchise, *id.* § 2804(2). The notice must be in writing, state the reason for the termination or nonrenewal, and identify the date on which the termination or nonrenewal will take "effect." *Id.* § 2804(a)(2), 2804(c)(1), (3). Generally, the notice must be given not less than 90 days "prior to the date on which such termination or

nonrenewal takes effect." *Id.* § 2804(a)(2). A notice of termination does not mark the end of the franchise, but is an expression of the franchisor's intention to terminate or nonrenew the franchise at a specified point in the future. Nothing in the Act prohibits a franchisor from extending the effective date or otherwise rescinding the notice. *Seckler*, 124 F.3d at 1403.

A dealer who has "sufficiently serious questions going to the merits" of the attempted termination or nonrenewal is expressly authorized to bring suit and seek injunctive and declaratory relief and damages. 15 U.S.C. § 2805(a), (b), and (d). The action must be commenced within 1 year after the date of the "termination of the franchise or nonrenewal of the franchise relationship" or the franchisor's failure to comply with Section 2802. *Id.* § 2805(a)(1)-(2). In order to establish a claim, the dealer must prove as a threshold matter a "termination" of the franchise or the "nonrenewal of the franchise relationship" within the meaning of the Act. *Id.* § 2805(c). A district court is authorized to issue preliminary and permanent injunctive relief where the franchisee shows that the "franchise of which he is a party has been terminated or the franchise relationship of which he is a party has not been renewed." *Id.* § 2805(b)(2). The Act vests the court with power to grant "such equitable relief as the court determines is necessary to remedy the effects of any failure to comply" with the statute. *Id.* § 2805(b)(1).

The requirement that a dealer demonstrate that the franchise of which he is a party "*has been terminated*" as a prerequisite to obtaining an injunction cannot be read to require an end of the franchise before a dealer is afforded relief under the PMPA. Such a requirement would render the relief Congress sought to provide in section 2805 wholly ineffective as it would require a dealer to go out of business before being permitted to seek an order preserving the franchise. Where Congress has specifically provided a mechanism to prevent a franchise from being terminated whenever the grounds or the manner of the termination are in doubt, it makes no sense to read section 2805 as requiring the dealer prove its franchise has ended before granting injunctive relief.

For similar reasons, a notice of termination or nonrenewal – while not "strictly speaking" a termination must be treated as a termination if the injunctive relief section of the Act is to be of any use, as several circuit courts of appeal have acknowledged. J.A. 450; *Dersch Energies, Inc.*, 314 F.3d at 869 quoting *Lippo*, 776 F.2d at 720 ("[i]n an action brought under section 2805(a) the franchisee has the burden of proving termination [or nonrenewal] of the franchise. (This must really mean attempted termination [or nonrenewal] if the injunctive relief is to be of any use.")). Shell and Motiva and the Solicitor likewise acknowledge that a franchisee who receives notice of termination may bring suit under the Act *before* the termination becomes effective. Pet. Br. at 50, 52 (emphasis in original); Brief of the United States

at 16, n. 6 ("It would make little sense for Congress to provide expressly for preliminary injunctive relief but require that the injury actually occur before such relief can be granted.").

There is no good reason that a dealer's rights under the Act should be any different where the franchisor ignores or knowingly circumvents the statute's notice requirements and attempts to terminate the franchise in a manner that is not authorized by the PMPA. Shell and Motiva acknowledge that "[a]ctions . . . speak louder than words" and a termination or nonrenewal can occur "even absent an express statement of termination." Pet. Br. at 34. Congress understood that not all terminations would occur according to the statutory criteria. The mechanisms created to protect franchisees from being terminated while they sought judicial review of the merits of the termination prove that point. The PMPA empowers a court not only to enjoin the termination of the franchise, but arms it with a panoply of equitable powers to remedy a franchisor's failure to comply with the provisions of section 2802 before termination occurs.

In this case, Shell assigned the franchises to Motiva which eliminated an essential component of the lease, the subsidy. The elimination was intended to cause economic harm to the dealers, force an end of their franchises, and convert the stations to ones operated by the franchisor. Neither the reason for the termination nor the means employed by Shell and Motiva to bring it about are permitted by the Act. To

accept Shell and Motiva's view of the Act would have required the dealers to abandon more than their stations, but their livelihoods, as a condition precedent to availing themselves of the PMPA's protection. It would allow a franchisor to ignore the restrictions imposed by section 2802 and render a dealer powerless to seek any relief until it was too late. It simply cannot be that Congress enacted a remedial statute and armed the district court with broad equitable powers, but withheld the protection until the harm the statute was designed to avert already occurred.

Case law recognizing a dealer's right of action under the PMPA where the franchise has not come to an end have labeled the dealers' claims as "constructive" in nature, *e.g.*, "constructive termination" or "constructive nonrenewal." *See infra* 28-35. Constructive means "legally imputed; having an effect in law though not necessarily in fact." *Black's Law Dictionary* (8th ed. 2004) (identifying nearly fifty established applications of "constructive" in the law). A "constructive" application is an exercise in equity, used in the law as a legal fiction to meet the demands of "convenience and justice." *Helvering v. Stockholms Exskilda Bank*, 293 U.S. 84, 92 (1934). The notion of a constructive cause of action fits well within the rights afforded by the PMPA. It certainly is not foreclosed by the Act's definitional section which says only that "termination includes [but is not limited to] cancellation." 15 U.S.C. § 2801(17). But, the designation is unnecessary to sustain the cause of action here

where the prohibited behavior is subject to a statutory remedy.

2. Shell and Motiva's analysis of the "constructive termination" claim fails to consider the injunctive remedy available in section 2805(b) and loses its way in an effort to detach the claim from its statutory setting. The fact that some dealers continued to operate their franchises for a period of time after the subsidy was eliminated is irrelevant to the dealers' claim. The Act's injunctive remedy expressly contemplates that a dealer would continue to operate the franchise during the pendency of the litigation. A dealer whose franchisor seeks to terminate the franchise with proper notice purporting to assert a valid reason for termination can obtain injunctive relief and remain in business while the issues are addressed on the merits. It would be a tortured reading of the PMPA to hold that a dealer that manages to remain in business despite a franchisor's unlawful effort to terminate the franchise is barred from seeking damages under the Act.

Even in circumstances where a court declines to issue injunctive relief, as in this case, or where a franchisee elects not to seek injunctive relief, a dealer who proves a violation of the Act is entitled to an award of damages sustained as a result of the franchisor's misconduct. 15 U.S.C. § 2805(d)(1)(A), (C). "If the franchisee prevails" in its action, the franchisee is entitled to "actual damages" and "reasonable attorney and expert witness fees." *Id.* Unwilling and unable to simply abandon their lives' work, many dealers took

extraordinary steps to remain in business. Such measures were expected: "sunk costs, optimism, and a habit of years might lead franchisees to try and make the new arrangement work, even when the terms have changed so materially as to make success impossible." J.A. 446-447.

B. A Prohibited Termination Occurs When an Assignment of a Franchise (1) Leads to a Breach of One of the Statutory Elements Effectively Ending the Franchise, Or (2) Is Invalid Under State Law

Further evidence that the Act's protection does not require an "end" of the franchise is found in its treatment of assignments. The court of appeals and the overwhelming weight of authority have recognized that a "constructive termination" of the franchise occurs under the Act where an assignment of the franchise results in a breach of one of its statutory elements or is invalid under state law. J.A. 444; *Barnes*, 795 F.2d at 362; *Fresher v. Shell Oil Co.*, 846 F.2d 45, 47 (9th Cir. 1988); *May-Som Gulf v. Chevron U.S.A., Inc.*, 869 F.2d 917, 923 (6th Cir. 1988); *Chestnut Hill Gulf, Inc. v. Cumberland Farms, Inc.*, 940 F.2d 744, 750-751 (1st Cir. 1991); *Cedar Brook Serv. Station, Inc. v. Chevron U.S.A., Inc.*, 930 F.2d 908 (2d Cir. 1991), *aff'g without op.*, 746 F. Supp. 278; *Shukla v. B.P. Exploration & Oil Co., Inc.*, 115 F.3d 849, 854 (11th Cir. 1997); *Beachler v. Amoco Oil Co.*, 112 F.3d 902, 906-909 (7th Cir. 1997); *cf.*, *April*

Mktg. & Distrib. Corp. v. Diamond Shamrock Ref. & Mktg. Co., 103 F.3d 28, 29-30 (5th Cir. 1997) (indicating that it would recognize a claim if plaintiffs alleged a "breach" of the franchise).[13] *But see Abrams Shell v. Shell Oil Co.*, 343 F.3d 482, 486-488 (5th Cir. 2003) (refusing to recognize a claim of constructive nonrenewal unless one of the "essential components" of the franchise has been "discontinued").

Shell and Motiva focus on the Fourth Circuit's decision in *Barnes* which they characterize as incoherent and suggest that the other circuits somehow have been led astray by that decision to recognize a theory wholly anathema to the PMPA. Pet. Br. at 34-40.[14] While the facts of this case differ in many ways from *Barnes*, the Fourth Circuit's reasoning is grounded in the Act's language, design and purpose and responded directly to the arguments made by Gulf, the original franchisor, and Anderson Oil, the assignee.

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[13] Contrary to Shell and Motiva's assertion that "[n]o other court of appeals had actually relied on *Barnes* to sustain a constructive termination claim until this case," Pet. Br. at 34, the circuits recognizing the claim have relied on *Barnes*, among other authorities. *May-Som Gulf*, 869 F.2d at 922-923; *Chestnut Hill Gulf*, 940 F.2d at 751; *Beachler*, 112 F.3d at 906; *Shukla*, 115 F.3d at 852.

[14] The suggestion that federal courts of appeals unthinkingly fall into lockstep with decisions that "make[ ] no sense" does not resemble the process of decision-making this Court has described in the federal appellate courts. *Salve Regina College v. Russell*, 499 U.S. 225, 232 (1991).

In *Barnes*, Gulf contracted to supply Barnes with gasoline at its dealer tank wagon price (DTW). *Barnes*, 795 F.2d at 361. The contract defined the DTW as the "seller's scheduled price in effect" at the time of delivery. *Id.* Following Gulf's assignment, Anderson Oil increased the price of fuel sold to Barnes at a markup over Gulf's DTW which amounted to $1,000 a month and forced Barnes to raise her prices, resulting in a decline in her sales and net income. 795 F.2d at 361. Gulf and Anderson argued that by reason of the assignment, Anderson was now the "seller" and was not obligated to deliver at Gulf's DTW. *Id.*

The Fourth Circuit analyzed two closely related claims concerning the effect of the assignment under the Act. The court first observed that the Act regulates the termination of "any contract pertaining to the supply of fuel." *Barnes*, 795 F.2d at 362 citing 15 U.S.C. § 2801(1)(B)(ii). This is so because Congress recognized that the Act's provisions restricting terminations of the franchise may be circumvented by termination or nonrenewal of the fuel supply agreement. *Id.* citing S. Rep. at 29. Congress also recognized that instances would arise when state assignment law would conflict with the Act's termination provisions, and instead of attempting to fashion hard and fast statutory rules to resolve these conflicts, the Act relied on the courts to resolve them through traditional principles of equity. *Barnes*, 795 F.2d at 362. The assignment and subsequent breach by Anderson Oil had the effect of terminating Gulf's

original contract to supply fuel oil to Barnes. Thus, the court concluded that the Act did "not contemplate that [Barnes] should be relegated to seeking damages from an assignee that might not have the resources to satisfy a judgment" and that Gulf could not "circumvent the protections the Act afford[ed] [Barnes] by the simple expedient of assigning the franchisor's obligation to [Anderson] who increases [Barnes'] burden." *Id.*[15]

Section 2805(a) of the Act provides that if a franchisor terminates a franchise in the absence of one of the grounds enumerated in the statute or without proper notice, the franchisee may bring an action against the franchisor under the Act for damages. *Barnes*, 795 F.2d at 361. Neither Gulf nor Anderson contended that any of the grounds existed to terminate Barnes and conceded that no notice was sent to Barnes. *Id.* The Act and the legislative history led the Fourth Circuit to conclude that the assignment to Anderson and Anderson's subsequent breach implicated the Act because it had the effect of terminating Gulf's original contract to supply gasoline to Barnes. *Barnes*, 795 F.2d at 362 (franchisee can obtain relief

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[15] Shell and Motiva doubt that there is any "federal interest in ensuring deep pockets" to satisfy a dealer's claim under the Act. Pet. Br. at 36. It would be strange indeed for Congress to have enacted remedial legislation and yet have no interest in the dealers' ability to be made whole for losses suffered as a result of the refiner's violation of the statute.

under Act "if the franchisee can no longer obtain gasoline at the stipulated franchise price.").[16]

The Fourth Circuit also recognized that implicit in the Act's provisions regarding assignments was the concept that an assignment unauthorized by state law is prohibited. The court commented that the unexpired portion of a franchise that has been invalidly assigned is no longer a franchise as defined by the Act. "An assignment that is invalid under state law because it increases the franchisee's burden is tantamount to a constructive termination of the franchise." 795 F.2d at 363.[17]

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[16] The First Circuit noted that a delay between the assignment and the breach was not relevant especially where, as here, the assignee is a joint venture in which the franchisor is a party. J.A. 446. *See also Fresher v. Shell Oil Co.*, 846 F.2d 45, 46-47 (9th Cir. 1988); *Riverdale Enters., Inc. v. Shell Oil Co.*, 41 F. Supp. 2d 56, 64 (D. Mass. 1999).

[17] The dealers did not bring a separate count alleging that the assignment to Motiva and the elimination of the subsidy violated state law. There is no doubt, however, that under the district court's instructions the jury's verdict would sustain a determination that it did. The jury concluded that the elimination of the subsidy "was such a material change that it effectively ended the lease. . . ." J.A. 373, 379-380, 449-450. Under Massachusetts law, the assignment would have been invalid because it materially changed the duties or materially increased the burdens of the dealers with the elimination of the subsidy. *American Employers' Ins. Co. v. City of Medford*, 38 Mass. App. Ct. 18, 22, 644 N.E.2d 241, 243 (Mass. App. Ct. 1995) (assignment invalid if it "materially change[s] the duty or risk of the obligor. . . ."); M.G.L. c. 106, § 2-210(2).

Shell and Motiva do little to address the Fourth Circuit's reasoning and its analysis of the Act other than to assert that the "assignment-plus-breach theory" defies the statutory text because the PMPA declares it is neutral with regard to state law assignments. The thrust of their argument is that *Barnes* and the decision below allow claims based on a mere breach of one of the elements of the franchise following an assignment by the franchisor.[18] In other words, constructive termination claims merely federalize breach of contract claims. Pet. Br. at 36-38. As the First Circuit explained, however, not every breach of contract will support a constructive termination claim. In this case, an appropriate threshold was set by requiring a "breach of the lease [that] 'was such a material change that it effectively ended the lease, even though the plaintiffs continued to operate the business.'" J.A. 447.

The First Circuit's standard has solid roots in the Act. Under section 2802(b)(2), termination of a franchise is permitted if there has been a "failure by the franchisee to comply with any provision of the

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[18] Shell and Motiva assert that constructive termination cases have most often involved assignments of the franchise followed by a breach of a statutory element of the franchise. Pet. Br. at. 35. That may be so, but an assignment is not a necessary element of this claim. A franchisor that so materially changes an element of the franchise so as to effectively end it is liable for a constructive termination without any assignment having taken place. *See Yonaty v. Amerada Hess Corp.*, 2005 WL 1460411 (N.D.N.Y. 2005).

franchise, which provision is both reasonable and of material significance to the franchise relationship." The Act also incorporates state assignment law which invokes a "materiality" standard. The First Circuit requirement that there be a breach creating such a material change in one of the elements of a franchise that it effectively ended the contract harkens back to the same statutory standard by which the franchisee's conduct is judged. J.A. 447.

Moreover, Shell and Motiva's complaint of an "incoherent standard" rings hollow. Pet. Br. at 28. Requiring the jury to determine whether Motiva's breach "effectively ended" the lease is no more problematic than asking a jury to determine materiality in a securities fraud context. That standard requires jurors to determine materiality based on whether there is a substantial likelihood that a reasonable investor would consider the omitted fact as having significantly altered the total mix of information available. *Basic Inc. v. Levinson*, 485 U.S. 224, 230-232 (1988). The Court eschewed the need for a bright line rule based on ease of application, which ignored the purpose of the legislation and Congress's policy decision. 485 U.S. at 236.

Shell and Motiva argue that simply because the Act does not authorize assignments that are prohibited by state law "does not mean that 'an assignment that is unauthorized by state law is prohibited' by the PMPA." Pet. Br. at 39. But this is exactly what the Act means. It is incongruous to suggest that Congress intended the Act to be indifferent to an assignment

invalid under state law in light of the 1994 Amendments that preclude terminations or nonrenewals based on a provision that is invalid or unenforceable under the Act.

Finally, Shell and Motiva argue that the language in *Barnes* – that "the unexpired portion of a franchise that has been invalidly assigned is no longer a franchise" – yields perverse results because the dealer would lose the protection of the Act. Pet. Br. at 40. In context, it is clear that the *Barnes* court meant that the franchise was terminated within the meaning of the Act, not that it was no longer a franchise. Neither is there a danger that franchisees will be unprotected. Assignments that violate state law are not self-executing; they require determinations by courts, which are in the best position to exercise the equity powers conferred by the Act to remedy the franchisor's unlawful conduct and to ensure justice.

What the decisions of the Fourth Circuit in *Barnes* and the First Circuit below demonstrate is that, given the Act's treatment of assignments and state law, Congress did not intend to foreclose constructive termination claims or to require that such claims require an "end" of one of the statutory elements. This is entirely consistent with the injunctive remedy available to franchisees under the Act in circumstances where franchisor conduct outside the grounds established by the Act jeopardizes the continuation of the franchise.

C. Analogies to Constructive Terminations in Other Contexts Are Irrelevant and Unpersuasive

1. Shell and Motiva analogize case law interpreting state statutes regulating "franchise terminations in other contexts" to the PMPA and claim that "many" courts have refused to recognize constructive terminations under those statutes. Pet. Br. at 32-34, n. 15.[19] That some state statutes governing franchise

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[19] Many of the cases cited by Shell and Motiva do not foreclose a constructive termination theory. *See, e.g., Speed Auto Sales, Inc. v. Am. Motors Corp.*, 477 F. Supp. 1193 (E.D.N.Y. 1979) (holding only that the facts of the case did not support a claim for constructive termination under New York General Business Law); *Fuller Ford, Inc. v. Ford Motor Co.*, No. CIV. 00-530-B, 2001 WL 920035, *13 (D.N.H. Aug. 6, 2001) ("To the extent that the Motor Vehicle Franchise Act provides for a cause of action in the event of a constructive termination, a plaintiff's proper recourse is to Section 357-C:3 . . ."); *Barney Holland Oil Co. v. FleetCor Techs., Inc.*, 275 F.App'x 351, 359 (5th Cir. 2008) (unpublished) (citing *Petereit v. S.B. Thomas, Inc.*, 63 F.3d 1169 (2d Cir. 1995), and stating: "[C]onstructive termination claim requires proof of a 'substantial decline in franchisee net income.'"). *Robert Basil Motors, Inc. v. General Motors Corp.*, 2004 WL 1125164, *3-5 (W.D.N.Y. 2004) (recognizing "constructive termination" under the New York Franchised Motor Vehicle Dealer Act even though the franchisee remained in business). Other cases relied on by Shell and Motiva have been questioned. *E.g., In re Kirkwood Kin Corp. v. Dunkin' Donuts, Inc.*, 1997 WL 529587, *9 (Del. Super. 1997) (unpublished) (questioning *Dave Greytak Enters. v. Mazda Motors of Am., Inc.*, 622 A.2d 14, 19-21 (Del. Ch. 1992); *JPM, Inc. v. John Deere Industrial Equipment Co.*, 94 F.3d 270, 272 (7th Cir. 1996) (questioning *East Bay Running Store, Inc. v. Nike, Inc.*, 890 F.2d 996, 999 (7th Cir. 1989)). Still others acknowledge constructive terminations. *See Petereit*, 63 F.3d at 1182-1183 (acknowledging that a franchisor's

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relationships outside of the petroleum industry may not recognize constructive terminations is immaterial and unpersuasive. The Act, by its terms, affords a dealer relief when the franchisor attempts to terminate the franchise on grounds and in a manner proscribed by the statute.

2. Similarly, Shell and Motiva argue that the court's decision below is inconsistent with constructive eviction in landlord-tenant law and constructive discharge in employment law. Unlike the relationship between landlord/tenant and employer/employee,

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plan to realign plaintiffs' sales territory could, in appropriate circumstances, "constructively terminate" the franchises in violation of the Connecticut Franchise Act, even where the franchisee remains in business). *See also Maintainco, Inc. v. Mitsubishi Caterpillar Forklift Am., Inc.*, 408 N.J. Super. 461, 478, 975 A.2d 510, 520 (N.J. Super. App. Div. 2009) ("termination" within meaning of the Franchise Practices Act includes constructive termination); *Carlos v. Philips Bus. Sys., Inc.*, 556 F. Supp. 769, 776 (E.D.N.Y. 1983) (recognizing franchisee's right to bring claim for unlawful "termination" or "nonrenewal" under New Jersey Franchise Practices Act and Connecticut Franchise Act where franchisor eliminated exclusive dealerships even though plaintiff remained in business); *Banc One Fin. Servs., Inc. v. Advanta Mortgage Corp. USA*, 2002 WL 88154, *10 (N.D. Ill. 2002) ("The concept of constructive termination recognizes that a party to a contract can engage in conduct that results in a termination of the contract even though the conduct itself does not actually terminate the contract."); *Bert Smith Oldsmobile, Inc. v. General Motors Corp.*, 2005 WL 1210993, *2 (M.D. Fla. 2005) ("constructive termination 'applies where one party unilaterally modifies the terms' of a contractual relationship in a manner that 'substantially interferes with the other party's ability to obtain the benefits of the contract.' ") (quotation omitted).

Congress recognized that the franchise relationship in the petroleum industry was "unique" because the franchisor grants a trademark license to the franchisee, and, in addition, often controls and leases the service station to the franchisee and "almost always" is the exclusive supplier of motor fuel. S. Rep. at 17. The viability of the franchise is dependent upon a continuing relationship among the parties. *Id.* at 18. The relationship between a landlord and tenant or an employer and employee bears no relationship to the investment by franchisees that Congress sought to protect, the mischief Congress sought to prevent, or the real life contract setting in which Congress framed the rights and obligations of the parties. The court of appeals concluded that the comparisons Shell and Motiva are making here were "misleading." J.A. 446.

The analogy to the common law recognition of constructive eviction is inapposite and outdated. Moreover, Shell and Motiva's blanket statement that the law only recognizes constructive evictions where the tenant has vacated the premises is not entirely accurate.[20] Courts now recognize that a lease is, in essence, "a contractual relationship" and reject the notion that a tenant's right to seek redress for

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[20] *See e.g.*, *Marini v. Ireland*, 56 N.J. 130, 146, 246 A.2d 526, 535 (N.J. 1970) (tenant not required to vacate premises); *Minjak v. Randolph*, 528 N.Y.S.2d 554, 140 A.2d 245, 248 (N.Y. 1st Dep't 1988) (same); *County Holding Corp. v. Brati Inc.*, 2002 WL 1275031 (N.Y. Supp. App. Term. 2002) (same).

unsuitable conditions is predicated upon abandonment of the premises.[21] Although the court of appeals properly declined to draw comparisons between the Act and common law constructive evictions,[22] it should be noted that, as the New Jersey Supreme Court did in *Reste Realty Corp. v. Cooper*, 53 N.J. 444, 452, 251 A.2d 268, 272 (N.J. 1969), contract remedies evolved from the recognition of the "inequality of bargaining power between landlord and tenant" and the harshness of the *caveat emptor* doctrine embodied in the traditional view of leases.

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[21] By adopting the view that a lease is essentially a contractual relationship, a more consistent and responsive set of remedies are available for a tenant. They are the basic contract remedies of damages, reformation, and rescission. *Restatement (Second) of Property* § 11.3 & comment a (1977) (allowing rent to be abated until default is cured and noting that traditional remedy of constructive eviction which requires abandonment of premises is too costly); *Restatement (Second) of Property* § 5.4(2)(a), (c) (1977) (where landlord's default makes property "unsuitable" tenant may continue lease and seek damages or use rent to eliminate unsuitable condition); *Restatement (Second) of Property* § 5.4 & comment b (1977); *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1083 (D.C. Cir. 1970) (if landlord failed to perform obligation to maintain the premises in habitable condition, tenant may remain in premises and suspend obligation to pay rent (in whole or in part)); *Hilder v. St. Peter*, 144 Vt. 150, 158-160, 478 A.2d 202, 207 (1984); *Harel Assoc. v. Cooper Healthcare Prof'l Servs., Inc.*, 271 N.J. Super. 405, 408, 638 A.2d 921, 923 (N.J. Super. 1994).

[22] As this Court has noted in another context, "the body of private property law . . . more than almost any other branch of law, has been shaped by distinctions whose validity is largely historical." *Javins*, 428 F.2d at 1074 quoting *Jones v. United States*, 362 U.S. 257, 266 (1960).

Finally, there is no indication in the text or history of the PMPA that Congress had any particular or analogous settings in mind when drafting the Act, and in no case would Congress have been bound to incorporate any pattern of interpretation, analogous or not. The Act reflects Congress's identification of prohibited acts and appropriate remedies. That must be the principal focus in interpreting the statute. What happens in some other legal environment may or may not be helpful. For the most part, the analogies embraced by Shell and Motiva are neither compelling, helpful, nor accurately described.

D. The Statutory Construction Urged By the Solicitor and Amici Does Not Honor the Words or the Intent of the PMPA

1. The Solicitor argues that in upholding the dealers' claim for constructive termination, the First Circuit had an incomplete understanding of the PMPA's purpose and history. According to the Solicitor, the Act reflects a compromise and delicate balance between competing interests of franchisors and franchisees that the court below upset by emphasizing franchisee protection to the exclusion of franchisor flexibility. Brief for the United States at 13-14. The Solicitor presents a skewed picture of the Act and its legislative history that focuses on isolated statements by congressmen and ignores the language of the Act itself. The House and Senate Reports make clear that the primary object of the PMPA was

prophylactic, both to avoid harm by mandating certain conduct by franchisors and by making franchisees whole for violations of the Act. *See Garcia v. United States*, 469 U.S. 70, 76 (1984) (authoritative source for finding Congress's intent lies in Committee Reports rather than passing comments of members or casual statements in floor debates). In the PMPA, as with Title VII, Congress "took care to arm courts with full equitable powers" to secure complete justice for franchisees. *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975). "For it is the historic purpose of equity to 'secur[e] complete justice.'" *Id. citing Brown v. Swann*, 10 Pet. 497, 503 (1836). Indeed, by its terms the Act contemplates a court's use of equitable relief as "necessary to remedy the effects of any failure [by the franchisor] to comply with the requirements" of the Act. *See* 15 U.S.C. § 2805(b)(1). Conversely, franchisors' interests with respect to termination and nonrenewal are tightly circumscribed in the Act, both in substance and procedure.

In short, there is no delicate balance of rights or requirements in the Act, and the Solicitor does not explain how the availability of constructive termination somehow deprives or even infringes on whatever "flexibility" the Act provides to franchisors. Nothing in the legislative history undermines the recognition by several courts of appeals that "[a]s remedial legislation, the PMPA must be given 'a liberal construction consistent with its overriding purpose to protect franchisees.'" *Beachler v. Amoco Oil Co.*, 112 F.3d 902, 904 (7th Cir. 1997) (citation omitted). The

Act surely does not preclude franchisors from terminating or refusing to renew a failing or bad franchise, it simply requires franchisors to follow the procedures in the Act in doing so. There is no delicate balance to protect where, as here, according to the jury, the franchisor embarked upon a concerted effort to take over these franchises by breaking the back of the franchisees and denying them fair compensation for their loss. The Solicitor's argument, if it could be persuasive in any case, is surely not relevant here.

2. Amicus Curiae The American Petroleum Institute ("Institute") argues that the theory of constructive termination frustrates Congress's goal of uniform standards because it depends on the application of state law. Institute Brief at 18-22. There is nothing remarkable in the application of state law in this case. The Act and the legislative history make clear that Congress's statutory design is not as hidebound as the Institute suggests and certainly does not require the rejection of constructive termination theories.

Aside from the limited reach of preemption, the Act contemplates the interplay of its provisions with state law. The 1994 Amendments prohibited the release or waiver of any right franchisees had under state and Federal law, 15 U.S.C. § 2805(f), and expanded the definition of failure to prohibit terminations and nonrenewals based on contract provisions illegal or unenforceable under state law. *Id.* § 2801(13). In adding to the definition of failure to exclude terminations or nonrenewals based on provisions

unlawful or unenforceable under state law, the 1994 Amendments overruled cases like *O'Shea v. Amoco Oil Co.*, 886 F.2d 584, which rejected a PMPA claim based on the franchisor's requirement that the franchisee operate 24 hours, which the franchisee argued was unlawful under state law.[23] The Third Circuit ruled that the PMPA did not incorporate state law. *Id.* at 589-590. Finally, the Act leaves the validity of assignments to state law and recognizes that assignment contrary to state law may constitute a termination of a franchise under the Act.

In sum, the PMPA contemplates the application of state law. That constructive termination claims may rest in part on the application of state law is therefore uneventful and does not require the rejection of that theory. No argument is made that in this case the application of Massachusetts law somehow imposed a requirement or prohibition on Motiva or Shell not grounded in the Act.

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[23] In *O'Shea* the franchisee claimed that the 24-hour provision violated New Jersey's Franchise Practices Act, which prohibited any franchisor, directly or indirectly, to impose unreasonable standards of performance on a franchisee. The Third Circuit rejected the franchisee's claim that a termination based on an unenforceable provision of the contract under state law violated the PMPA. *Id.* at 589-590.

II. THE ACT'S LANGUAGE, DESIGN AND PURPOSE RECOGNIZE A CLAIM FOR CONSTRUCTIVE NONRENEWAL (No. 08-240)

Section 2802 of the Act prohibits a franchisor from insisting on changes or additions to franchise agreements if they are "for the purpose of converting the leased marketing premises to operation by employees or agents of the franchisor or otherwise preventing the renewal of the franchise relationship." 15 U.S.C. § 2802(b)(3)(A)(ii). The jury found that new provisions in the Motiva leases were designed to discourage the dealers from signing the leases and enable Motiva to unlawfully convert their stations. J.A. 375, 382. The court of appeals agreed that Motiva's conduct violated the Act,[24] but nonetheless rejected the jury's determination that the franchises had been constructively nonrenewed because it believed that the dealers "ratif[ied]" the unlawful terms by signing the leases. J.A. 453. According to the court below and Shell and Motiva, had the dealers refused to sign the leases and waited for the franchisor to send a notice of nonrenewal, then the dealers would have a claim under the Act. J.A. 453; Pet. Br. p. 50. The court's decision ignores the PMPA's

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[24] The court of appeals recognized that the Act forbids "franchisors using their power to dictate impossible franchise terms in order to force the franchisees to walk away from their investments or to sell them at artificially low prices," J.A. 449, n. 13, and the plan to force dealers out of business "falls within the scope of the PMPA, . . . " J.A. 447-448.

language, design and purpose, and above all else, elevates form over substance.

A. The Act Does Not Require Issuance of a Notice As a Condition Precedent to Bringing a Claim that the Franchisor Failed to Comply with Section 2802

The enforcement provisions set forth in section 2805(a) make any failure of the franchisor "to comply with the requirements" of section 2802 actionable; there is no reference in section 2805(a) to a "notice" of any kind as a condition precedent to seeking redress under the statute. 15 U.S.C. § 2805(a). Indeed, the only time the PMPA requires the issuance of a notice is when the franchisor intends to lawfully terminate or nonrenew the franchise on grounds enumerated in the statute. *Id.* § 2802(b)(1)(A). The jury found that Shell and Motiva failed to comply with section 2802 because provisions in the Motiva leases were designed to discourage the dealers from signing the leases and enable Motiva to unlawfully convert their stations. J.A. 375, 382. Since the Act does not require the issuance of a notice as a prerequisite to maintaining suit where the franchisor fails to comply with section 2802, it was error for the court of appeals to reverse the jury's verdict on the constructive nonrenewal claim.

Had the dealers refused to sign the leases and had notices of nonrenewal then been issued, the court of appeals and Shell and Motiva concede a cause of

action under the statute. J.A. 453; Pet. Br. at 50, 52. On this record, the same verdict would have been reached: Shell and Motiva violated the PMPA because the lease terms were improper. As noted earlier, *supra* at 22-26,[25] a notice of nonrenewal, while not strictly speaking a nonrenewal, must be treated as one if the injunctive relief section of the Act is to be of any use. The court of appeals, Shell and Motiva, and the amici agree with this proposition and acknowledge that a franchisee who receives notice of nonrenewal may bring suit under the Act before the nonrenewal becomes effective. J.A. 450; Pet. Br. at 50, 52; *See also*, Brief of the United States at 16, n. 6. This is so because under the Act, a notice of nonrenewal is treated as the "precise equivalent of a nonrenewal." *Dersch Energies, Inc.*, 314 F.3d at 864, citing *Lippo*, 776 F.2d at 720.

There is no good reason why a dealer's rights under the Act should be any different where, in lieu of a written notice, the franchisor presents an unlawful lease on a "take-it-or-leave-it" basis and unequivocally states that it will terminate the franchise if the dealer refuses to sign the lease. The Hobson's Choice presented by the court of appeals – sign the lease and waive any claims under the Act, or refuse to sign, wait for a notice of termination and hope to establish with sufficient proof that the equities warrant a

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[25] Many features of the Act discussed earlier in connection with the constructive termination apply to the constructive nonrenewal claim.

preliminary injunction – is no choice at all. It forces a dealer to risk losing his business as a prerequisite to seeking redress under the PMPA. The court of appeal's view of the statute is inconsistent with the protection Congress intended to provide. Few franchisees presented with oppressive franchise agreements that arguably violate the Act have the economic wherewithal to cease operations and engage in protracted battles against formidable opponents like Shell/Motiva.[26]

The court of appeals was also concerned that a dealer who signs the renewal agreement under protest and then brings suit does not "risk[ ] the end of the franchise if the claim fails," but provides no reasonable explanation why the language of the Act requires any risk. J.A. 453. Indeed, it is a rather jarring conclusion when considered in light of the disparate bargaining power of the parties and the very purpose of the Act to provide a counterbalance for the franchisees. Even granting the court's assumption that the dealer does not take any risk,[27]

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[26] During the course of the litigation, Shell and Motiva filed two motions to dismiss and three motions for summary judgment, all of which were denied. J.A. 2, 10, 133. The district court and the court of appeals noted unreasonable and "inexcusable" delays in the proceedings attributable to Shell and Motiva. J.A. 439, n.7; J.A. 126.

[27] By signing and then challenging the lease the dealers not only subjected themselves to the expense of the litigation, but also to the risk that the dealers would have to reimburse petitioners' for their fees and costs if the dealers were unsuccessful in their claim. *See e.g.*, J.A. 299-300 (lease allows Motiva to

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that does not mean that the franchisee will somehow benefit from a windfall and does not in any way undermine or harm the franchisor's rights under the Act. One reasonably assumes that the leases proffered by Motiva in this case reflected arrangements that Motiva thought beneficial to its business interests and the dealers' payment of rent during the period that they remained in business caused Motiva no harm.

B. Whether the Dealers "Ratified" or "Accepted" the Motiva Leases Was Not Presented to the Jury

The court of appeals' suggestion that signing the Motiva leases "under protest" somehow "ratified" the unlawful lease terms effectively turns the definition of ratification on its head. Ratification requires voluntary action, and this Court has recognized in other contexts that causes of action are not barred where payments have been made "under protest" when faced with a choice between making an improper payment or discontinuing an entire line of business. *See United States v. State Tax Comm'n of Mississippi*, 412 U.S. 363, 368 n. 11 (1973) (payments "were obtained only by coercion; they were paid under protest; and thus they hardly can be said to have been voluntary."); *United States v. Williams*, 514 U.S.

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recover attorney's fees incurred "to secure or protect" rights under lease).

527, 532 (1995) ("Assumpsit refund actions were unavailable to volunteers, a limit that would not have barred Williams because she paid under protest.") (*citing Philadelphia v. Collector*, 5 Wall. 720, 731-732 (1867) ("Where the party voluntarily pays the money, he is without remedy; but if he pays it by compulsion of law, or under protest, or with notice that he intends to bring suit to test the validity of the claim, he may recover it back. . . ."); *Dada*, 128 S.Ct. at 2317 (Court declined to construe statute to remove important safeguard where text did not preclude safeguard); *see also Ex Parte Wright*, 443 So.2d 40, 41-42 (Ala. 1983) (contracts signed under protest preserved right of teachers to challenge contracts under Alabama Teacher Tenure Act). Even under Uniform Commercial Code, "[a] party who with explicit reservation of rights performs or promises performance or assents to performance in a manner demanded or offered by the other party does not thereby prejudice the rights reserved. Such words as 'without prejudice,' 'under protest' or the like are sufficient." U.C.C. § 1-207(1) (1990). Here, in addition to signing the leases under protest, dealers' legal counsel wrote to Motiva (before any dealer signed a renewal lease) to protest the legality of the new leases and "reserve all rights and causes of action" available to the dealers to challenge the new leases. J.A. 129-131; Pet. Br. at 11, n. 7. The dealers also initiated this lawsuit *before* they signed the Motiva leases.

Shell and Motiva couch their argument in slightly different terms than the court below and assert that the dealers have no claim under the Act because they signed and therefore "accepted" the new leases. Pet. Br. at 49-50. Shell and Motiva agree that new lease terms adopted with "[b]ad motives can transform an otherwise permissible non-renewal into an unjustified one." Pet. Br. 49. They contend, nevertheless, that bad motives cannot transform a renewal into a nonrenewal where the dealer signs the renewal agreement. *Id.*

Whether under these circumstances, the dealers "ratified" the agreement presented a question of fact for the jury. *Bui v. Ma*, 62 Mass. App. Ct. 553, 565, 818 N.E.2d 572, 581 (Mass. App. Ct. 2004) ("ratification is essentially a question of fact"); *Cabot Corp. v. AVX Corp.*, 448 Mass. 629, 642, 863 N.E.2d 503, 514-515 (Mass. 2007). Shell and Motiva did not, however, request an instruction or verdict question on this issue or raise it in their post-trial motions; it may not be raised now. *Robles-Vazquez*, 110 F.3d at 206 & n. 5. *See also Guzman v. Visalia Community Bank*, 71 Cal.App.4th 1370, 1376 (Cal. App. 5th Dist. 1999) citing 1 *Corbin on Contracts* (rev. ed. 1993) § 3.30, p. 477.[28]

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[28] A somewhat related question – whether releases signed by two dealers were ineffective because they were signed under "duress" – was presented to the jury, which determined that the signatures were procured under duress and, therefore, the releases were not enforceable. J.A. 386; C.A. App. pp. 90-91.

C. The Act's Structure and Purpose Support the Holding in *Pro Sales*

The First Circuit declined to follow the holding in *Pro Sales,* in which the Ninth Circuit rejected a restrictive reading of the PMPA where "a franchisee would be forced to choose between accepting an unlawful and coercive contract in order to stay in business [or] rejecting it and going out of business in order to preserve a cause of action." 792 F.2d at 1399 (citation omitted).[29] "Such a Catch-22 is inconsistent with congressional intent." *Id.* Congress, the court noted, was concerned with threats of nonrenewal as well as actual nonrenewals, and requiring an actual nonrenewal gives no relief from threats, only from actions. The court also acknowledged the force of simple economics: "Indeed, such a rule might provide an incentive to the franchisor to insist on a contract that is illegal under the PMPA but with which the franchisee can stay in business, because the franchisee would have to go out of business and file suit to contest the legality of the terms, something few

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[29] Several district courts have allowed constructive nonrenewal claims based on this reasoning. *See Dean v. Kerr-McGee Ref. Corp.*, 714 F. Supp. 1155, 1158 (W.D. Okla. 1988); *Siecko v. Amerada Hess Corp.*, 569 F. Supp. 768, 771 n.2 (E.D. Pa. 1983); *Meyer v. Amerada Hess Corp.*, 541 F. Supp. 321, 329 (D.N.J. 1982); *RKJ Enters., Inc. v. Sun Co., Inc.*, 1998 WL 833857, *3 (E.D. Pa. Dec. 2, 1998) ("Congress did not intend to force a franchisee to abandon the franchise relationship to invoke the protection of a law designed to protect a franchisee's interest in continuing that relationship"); *Sun Franchise Ass'n v. Sun Ref. and Mktg. Co.*, 1992 WL 97359, *4 (E.D. Pa. April 29, 1992).

franchisees can afford to do." *Id.* Consequently, the court ruled that "a franchisee who signs a successor contract under protest and promptly seeks to invoke its rights under the PMPA . . . has not 'renewed' the franchise relationship so as to bar relief under the PMPA." *Id.* "To require an actual abandonment of years of work and investment before we recognize a right of action under the PMPA would be unreasonable. The 'congressional plan would be frustrated by requiring a franchisee to go out of business before invoking the protections of the PMPA.'" *Pro Sales*, 792 F.2d at 1399.

1. The First Circuit instead adopted the reasoning in *Dersch*, which addressed a violation of section 2805(f), not section 2802, and held that procedurally the Act "requires [a franchisee] faced with objectionable contract terms [to] refrain from ratifying those terms by executing the contracts (even 'under protest') and operating under them" and offers relief for a franchisor's improper conduct only when there is an actual nonrenewal of the franchise relationship. J.A. 452-453 (citing *Dersch Energies, Inc.*, 314 F.3d at 866). The holding in *Dersch* is inconsistent with earlier cases decided by the Seventh Circuit, is vigorously contested by the dissent, and is fundamentally at odds with the PMPA.

In any action brought under section 2805(a), the franchisee has the burden of proving the "termination of the franchise or the nonrenewal of the franchise relationship." 15 U.S.C. § 2805(c). In *Lippo*, the Seventh Circuit noted that "[t]his must really mean

attempted termination if the injunctive relief is to be of any use." *Lippo*, 776 F.2d at 720. In a later decision, the Seventh Circuit accepted the viability of a claim for constructive termination where an assignment of the franchise results in the breach of an "essential component of the statutory franchise or violates state law." *Beachler*, 112 F.3d at 907.[30] These decisions accept the proposition that a dealer may bring a claim under the Act even though the dealer remains in business and without the issuance of a notice of termination. In other words, a termination or nonrenewal within the meaning of the PMPA does not require an "end" to the relationship nor is notice of termination or nonrenewal a condition precedent to bringing suit. Indeed, *Dersch* notes, as do Shell and Motiva, that there are "situations where a franchisor's actions will indirectly result in termination or nonrenewal of a franchise or the nonrenewal of the franchise relationship – an informal termination or nonrenewal." *Dersch*, 314 F.3d at 859. It is against this backdrop that the holding in *Dersch* – that a dealer cannot maintain an action for unlawful nonrenewal unless it refuses to sign the lease and is issued a notice of nonrenewal – simply makes no sense.

The holding in *Dersch* is not only inconsistent with earlier Seventh Circuit decisions, it is internally

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[30] *Dersch* misstates the holding in *Beachler* when it states that a claim for constructive termination requires the "discontinu[ance]" of one of the statutory elements of the franchise. *Dersch*, 314 F.3d at 859.

inconsistent. For example, the court holds that "a formal notice of nonrenewal is not necessarily a prerequisite to filing suit under the PMPA," *Dersch* 314 F.3d at 866, n. 20, but then rejects Dersch's claim precisely because his franchisor did not issue a notice of nonrenewal. *Id.* at 866. The court contends that a franchisee is protected against terminations because "'a franchisor cannot terminate without providing requisite notice,'" *id.* at 865 quoting *Shell v. Shell Oil Co.*, 216 F. Supp. 2d 634, 640 (S.D. Tex. 2002), but also acknowledges that sometimes a franchisor's actions will "indirectly result" in a nonrenewal. *Dersch* 314 F.3d at 859. It is this type of inconsistency that led to a vigorous dissent. *Dersch,* 314 F.3d at 867-875.

The timing of a suit challenging the renewal lease concerned the First Circuit: "Allowing a franchisee to sign 'under protest' and then later challenge the renewal would extend the period of uncertainty through the entire first year of a contract that in this case was only three years." J.A. 453. Unlike Dersch, who signed his lease under protest, but waited nearly a year to bring suit, all but one of the dealers brought suit *before* signing the Motiva leases, a fact that the court of appeals overlooked. Even had the petitioners forced Motiva to issue notices of nonrenewal, there is every likelihood that the case would have engaged the parties and the district court for the same period of uncertainty.

CONCLUSION

The judgment of the court of appeals should be affirmed with respect to the termination claim (No. 08-373) and reversed with respect to the nonrenewal claim (No. 08-240). Additionally, the dealers should be awarded their reasonable attorneys' fees and costs incurred in connection with this appeal pursuant to 15 U.S.C. § 2805(d)(1)(C); *D'Arcy v. Union Oil Co. of California*, 937 F.2d 611, 1991 WL 127649, *5 (9th Cir. 1991) (unpublished decision).

Respectfully submitted,

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Nos. 08-240 and 08-372

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IN THE

Supreme Court of the United States

MAC'S SHELL SERVICE, INC., *ET AL.*,
Petitioners,

v.

SHELL OIL PRODUCTS COMPANY LLC, *ET AL.*,
Respondents.

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Petitioners,

v.

MAC'S SHELL SERVICE, INC., *ET AL.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF FOR SHELL OIL PRODUCTS COMPANY LLC, MOTIVA ENTERPRISES LLC, AND SHELL OIL COMPANY

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QUESTIONS PRESENTED

The Petroleum Marketing Practices Act, 15 U.S.C. §§2801 *et seq.*, regulates the circumstances in which a petroleum refiner or wholesaler can "terminate" a service-station franchise or "fail to renew" a franchise relationship. In this case, several Massachusetts service-station dealers claimed that they had been "constructively terminated" in violation of the Act, even though they continued to operate their franchises (indeed, many were still operating at the time of trial, almost five years after they claim to have been "constructively terminated"). Similarly, the dealers claimed that they had been "constructively non-renewed" in violation of the Act, even though they were offered and signed renewal agreements. The questions presented are:

1. Whether a service-station dealer that continues to operate its franchise—using the same trademark, selling the same fuel, and occupying the same premises—can bring an action claiming that it was "constructively terminated" in violation of the Act. (No. 08-372)

2. Whether a service-station dealer that is offered and signs a renewal agreement can bring an action claiming that it was "constructively non-renewed" in violation of the Act. (No. 08-240)

PARTIES TO THE PROCEEDINGS BELOW

Shell Oil Products Company LLC, Motiva Enterprises LLC, and Shell Oil Company were defendants in the district court and appellants in the court of appeals.

Mac's Shell Service, Inc., Cynthia Karol, John A. Sullivan, Akmal, Inc., Sid Prashad, RAM Corporation, Inc., J&M Avramidis, Inc., and Stephen Pisarczyk were plaintiffs in the district court and appellees in the court of appeals. Three K's, Inc., was a plaintiff in the district court, was an appellee in the court of appeals, and is a respondent in this Court under this Court's Rule 12.6.

Francis Marcoux, Abraham Abraham, Jordan Avramidis, Chriss Azazian, Richard Baima, Ed Baker, Steve Black, James Coggeshall, Michael Corbett, Patricia Dasilva, Alex Dasilva, Steve Falcone, George Fontaine, Bill Fontaine, Camille Francis, Matty Gaeta, Donald Gagnon, John Generoso, Kal Hamze, Abraham Hamze, Tibor Hangyal, Adam Hipp, Abdul Kafal, George Kantarges, Jim Kantarowski, William Kaufman, Joe Kelleher, Hussein Kobessi, Mike Lamarche, Richard Melanson, Akmal Moawed, Constantin Peides, Harvey Rudnick, Roger Thibault, Dimitrious Tsanikilides, Stephen Shea, J. Enterprise, Inc., Nikolas Manousaridis, Paul Sroczynski, JES Service, Inc., Ronnie Aboud, Mahendrs Amin, Massoud Atalish, Mike Atalish, Douglas Chapman, Steve Frangias, John Golden, Kal Hamze, Patrick Hines, Muhammad Imatiaz, Jay Jon, Kay Jon, Jaque Kanaan, James Moraidis, Sunny Patel, Russell Picard, Paul Richards, Fred Saad, Aziz Saba, Walid Samrout, Earl Stickney, Thomas Sullivan, Toufic Atallah, Dror Dusdushman, Earl McLaughlin, Wilson Tiburtino, Lasco Enterprises, Inc., and Larry Rubensein were plaintiffs in the district court.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Shell Oil Products Company LLC, Motiva Enterprises LLC, and Shell Oil Company state as follows:

1. Shell Oil Company (erroneously sued as "Shell Oil Company, Inc.") is a Delaware corporation and a wholly owned subsidiary of Shell Petroleum, Inc. Shell Petroleum, Inc. is a Delaware corporation, the shares of which are owned directly or indirectly by Shell Petroleum N.V. Shell Petroleum N.V. was founded under the laws of the Netherlands. The shares of Shell Petroleum N.V. are owned 100% by Royal Dutch Shell plc, a publicly traded company. Royal Dutch Shell plc is the ultimate parent company of the companies which comprise the Shell Group.

2. Motiva Enterprises LLC is a Delaware limited liability company in which Shell Oil Company and Saudi Refining Inc. respectively own directly or indirectly 50% of the ownership interests. The ultimate parent company of Saudi Refining Inc. is the Saudi Arabian Oil Company ("Saudi Aramco"). Saudi Refining Inc. and Saudi Aramco are not publicly traded companies.

3. Shell Oil Products Company was formed as a Delaware corporation wholly owned by Shell Oil Company. On April 1, 2001, Shell Oil Products Company converted to a Delaware limited liability company now known as Shell Oil Products Company LLC. Shell Oil Products Company LLC is wholly owned by Shell Oil Company.

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BRIEF FOR SHELL OIL PRODUCTS COMPANY LLC, MOTIVA ENTERPRISES LLC, AND SHELL OIL COMPANY

DECISIONS BELOW

The opinion of the court of appeals (J.A. 429-462) is published at 524 F.3d 33 (1st Cir. 2008). The order and judgment of the district court (J.A. 400-425) are unreported.

STATEMENT OF JURISDICTION

The court of appeals entered judgment on April 18, 2008, and denied rehearing and rehearing en banc on May 23, 2008 (J.A. 463-464). The petition in No. 08-240 was filed on August 21, 2008. On August 14, 2008, Justice Souter extended the time to file the petition in No. 08-372 to and including September 20, 2008, and that petition was filed on September 19, 2008. This Court granted both petitions on June 15, 2009. The Court has jurisdiction under 28 U.S.C. §1254(1).[1]

STATUTORY PROVISIONS INVOLVED

Title I of the Petroleum Marketing Practices Act, 15 U.S.C. §§2801-2807, is set forth in an appendix to this brief (App., *infra*, 1a-28a).

STATEMENT

The Petroleum Marketing Practices Act ("PMPA"), 15 U.S.C. §§2801 *et seq.*, regulates the circumstances in which a petroleum refiner or wholesaler can "terminate" a service-station franchise or "fail to renew" a franchise relationship. These consolidated cases present two related questions. The question in No. 08-372 is whether a service-station franchisee can claim it was "terminate[d]" within the meaning of the PMPA when, in fact, it continues to operate its franchise. The question in No. 08-240 is whether a service-station franchisee can claim that the franchisor "fail[ed] to renew" the franchise relationship within the meaning of the PMPA when, in fact, the franchisee signed a renewal agreement. The court of appeals answered the first question in the affirmative, holding that a franchisee can claim to have been terminated even

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[1] Pursuant to this Court's order of July 27, 2009, Shell and Motiva are filing as if they were petitioners in both cases even though they prevailed in No. 08-240.

if it continues to operate. Indeed, half the plaintiffs in this case were still operating their franchises at the time of trial, almost five years after their alleged "termination." The court of appeals answered the second question in the negative, holding that a franchisee that signs a renewal agreement cannot claim the franchisor failed to renew the franchise relationship.

I. STATUTORY FRAMEWORK

Petroleum refiners and wholesalers provide motor fuel to the public through service stations that are often operated by independent retailers (frequently called "dealers"). A petroleum franchise agreement between the supplier and dealer typically authorizes the dealer to use a refiner's trademark, provides for the supply of fuel, and may include a lease of the premises. See S. Rep. No. 95-731, at 17 (1978); H.R. Rep. No. 95-161, at 14 (1977). Franchise agreements ordinarily have a specified term (*e.g.*, three years) after which they automatically expire. See, *e.g.*, J.A. 268. The parties can "renew" the relationship at the end of that term by executing a new agreement. See S. Rep. No. 95-731, at 18.

In the 1970s, Congress received "numerous complaints by franchisees of unfair terminations or non-renewals of their franchises." S. Rep. No. 95-731, at 17; H.R. Rep. No. 95-161, at 14. Congress responded in 1978 by enacting the PMPA. Rather than regulate all aspects of the franchise relationship, Congress focused on the two areas that had prompted complaint by "defin[ing] the rights and obligations of the parties to the franchise relationship in the crucial area of *termination* of a franchise or *non-renewal* of the franchise relationship." S. Rep. No. 95-731, at 19 (emphasis added); see H.R. Rep. No. 95-161, at 16. The Act "prohibits a franchisor from terminating a franchise during the term of the franchise agreement and

from failing to renew the relationship at the expiration of the franchise term, unless the termination or nonrenewal is based upon a ground specified or described in the legislation and is executed in accordance with the notice requirements of the legislation." S. Rep. No. 95-731, at 15.

Definition of "Franchise." The PMPA begins by identifying the agreements subject to its restrictions. It defines a "franchise" as a contract under which a refiner authorizes a retailer to use its trademark in selling motor fuel (as well as similar arrangements between refiners and distributors, between distributors and retailers, or between two distributors). 15 U.S.C. §2801(1)(A). The term "franchise" also includes any associated agreement providing for the "supply of motor fuel" or authorizing the retailer to "occupy leased marketing premises." *Id.* §2801(1)(B)(i)-(ii). Those three elements—the right to use a trademark, to occupy premises, and to obtain fuel—are known as the "statutory elements" of a franchise. J.A. 430 n.1.

Grounds for Termination or Non-Renewal. The PMPA provides that, except as permitted by the Act, no franchisor may "(1) terminate any franchise * * * prior to the conclusion of the term, or the expiration date, stated in the franchise," or "(2) fail to renew any franchise relationship." 15 U.S.C. §2802(a).[2] The Act then sets forth permissible grounds for terminating a franchise during its term or declining to renew the relationship upon the franchise agreement's expiration. *Id.* §2802(b)(2). For example, a franchisor may terminate or refuse to renew a

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[2] The Act uses the broader term "franchise relationship" in the nonrenewal context to clarify that the franchisor may have an obligation to renew even after a franchise agreement expires, and to clarify that the franchisor need not offer the same terms in the renewal agreement. See 15 U.S.C. §2801(2); S. Rep. No. 95-731, at 30.

dealer that breaches a provision of the franchise agreement that is "reasonable and of material significance to the franchise relationship." *Id.* §2802(b)(2)(A).

The Act also sets forth grounds that justify nonrenewal at the end of a franchise's term but not termination during its term. 15 U.S.C. §2802(b)(3). One ground is "[t]he failure of the franchisor and the franchisee to agree to changes or additions to the provisions of the franchise." *Id.* §2802(b)(3)(A). The PMPA thus does not require franchisors to keep offering the same terms in each succeeding agreement. Instead, the franchisor can propose different terms—even terms that alter the parties' economic burdens—and then refuse to renew the franchise relationship if the dealer does not agree to them. Congress thus "recognize[d] the importance of providing adequate flexibility so that franchisors may initiate changes in their marketing activities to respond to changing market conditions and consumer preferences." S. Rep. No. 95-731, at 19. The new terms, however, must have been proposed "in good faith and in the normal course of business." 15 U.S.C. §2802(b)(3)(A)(i). And the terms must not have been proposed "for the purpose of converting the leased marketing premises to operation by employees or agents of the franchisor * * * or otherwise preventing the renewal of the franchise relationship." *Id.* §2802(b)(3)(A)(ii). The Act thus "strike[s] a balance between the at times conflicting interests of the parties." S. Rep. No. 95-731, at 15.

Notice Requirements. A franchisor must normally provide notice of its intent to terminate or not to renew "not less than 90 days prior to the date on which such termination or nonrenewal takes effect." 15 U.S.C. §2804(a). Where 90 days' notice is impractical, the franchisor must provide notice as early as "reasonably practi-

cable." *Id.* §2804(b)(1). The notice must set forth the grounds for termination or non-renewal and other specified information. *Id.* §2804(c)(3).

Remedies. The Act authorizes a dealer to "maintain a civil action against [a] franchisor" that "fails to comply with the requirements of section 2802" (the provision restricting termination and non-renewal), subject to a one-year statute of limitations. 15 U.S.C. §2805(a). The dealer has the "burden of proving the termination of the franchise or the nonrenewal of the franchise relationship"; the franchisor, however, has the burden of justifying the termination or non-renewal. *Id.* §2805(c).

The Act authorizes equitable relief, including declaratory judgments, mandatory or prohibitory injunctions, and interim relief. 15 U.S.C. §2805(b)(1). Courts are required to grant a preliminary injunction when a dealer has been terminated or non-renewed so long as there are "sufficiently serious questions" to present a "fair ground for litigation" and the balance of hardships favors relief. *Id.* §2805(b)(2). Neither irreparable harm nor a likelihood of success need be shown. See *ibid.*

Plaintiffs can also recover actual damages. 15 U.S.C. §2805(d)(1)(A). In any case involving "willful disregard" of the Act's requirements, plaintiffs can obtain punitive damages as well. *Id.* §2805(d)(1)(B). Finally, plaintiffs are entitled to attorney's fees and expert witness fees whenever they recover more than nominal damages. *Id.* §2805(d)(1)(C).

Preemption. To provide "certainty and uniformity in franchise relationships which permeate a nationwide motor fuel distribution and marketing network," the PMPA "preempts state law in the subject areas in which the federal legislation deals." S. Rep. No. 95-731, at 16. The Act thus preempts any state law with respect to "termi-

nation" of a covered franchise or "nonrenewal" of a covered franchise relationship if it differs from the federal requirements. 15 U.S.C. § 2806(a)(1). The Act also clarifies that it neither prohibits assignment of a franchise as authorized by contract or state law, nor authorizes assignment where otherwise prohibited. *Id.* § 2806(b)(1).

II. PROCEEDINGS BELOW

A. Background

This case arises out of a dispute among several Shell service station operators in Massachusetts (the "dealers"), Shell Oil Company ("Shell"), and Shell's assignee, Motiva Enterprises LLC ("Motiva"). The franchise agreements between Shell and each dealer specified a monthly "contract rent" for the station premises. See J.A. 240, 430-431.[3] For many years, Shell also offered a program (referred to by the court of appeals as a "subsidy") that reduced a dealer's rent depending on the volume of gasoline sold. See *id.* at 332-335, 430-431. The written program terms furnished to dealers "explicitly provided for cancellation [of that program] with thirty days' notice." *Id.* at 431; see *id.* at 334. The franchise agreements also contained integration clauses that required any modification to be in writing. See *id.* at 263.

In 1998, Shell, Texaco, and Saudi Refining combined their petroleum refining and marketing operations in the eastern United States by forming Motiva Enterprises LLC. See J.A. 430; C.A. App. 2476. Shell assigned its rights and obligations under its franchise agreements to

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[3] Shell typically executed two contracts with its dealers—a lease of the premises and a "dealer agreement" addressing fuel supply and trademark rights. See J.A. 239-267; C.A. App. 1395-1410. Like the court of appeals, we refer to both collectively as the "franchise agreement."

Motiva; Texaco's franchises were transferred as well. See J.A. 109, 430; C.A. App. 3608. Because the entities forming Motiva had offered different terms to their respective dealers, Motiva inherited franchise agreements with inconsistent provisions. See J.A. 218, 402. For example, unlike Shell, Texaco had calculated rent using an "asset-based" formula—10% of the value of the land, plus 11.5% of the value of the buildings, plus 11.5% of the value of the equipment. See *id.* at 218-219, 237. In addition, unlike Shell, Texaco had not offered a volume-based rent subsidy. *Id.* at 215.

Motiva took two steps that reconciled those differences but also led to the disputes in this case. First, invoking the provision authorizing it to discontinue the volume-based rent subsidy, Motiva substituted a new transitional subsidy for 16 months and then ended the subsidy entirely effective January 1, 2000. See J.A. 430-431; C.A. App. 2912-2914, 2922. Second, as each dealer's franchise agreement expired, Motiva offered a new agreement that calculated annual rent using an asset-based "10-12-12" formula similar to the one Texaco had used—10% of the value of the land, plus 12% of the value of the buildings, plus 12% of the value of the equipment. See J.A. 236-238, 450; C.A. App. 3655. As the district court observed, "the entire industry was changing the manner of computing rent" by "switch[ing] to a formulation based on the value of the station's real estate." J.A. 402; see *id.* at 196-197, 234-236. That shift reflected "a change in the use of gas stations from simply selling gasoline and oil to including also convenience stores and other amenities." *Id.* at 402; see *id.* at 217-218.

B. Proceedings in the District Court

1. On July 27, 2001, 63 Massachusetts service-station dealers filed this lawsuit against Shell and Motiva. J.A.

55-65.[4] The complaint acknowledged that the rent subsidy's written program terms authorized Shell to discontinue the subsidy on 30 days' notice. *Id.* at 71. But the dealers claimed that Shell sales representatives had orally promised that the subsidy or something like it would always exist. *Id.* at 71-72. They claimed that discontinuation of the subsidy was thus a breach of contract under state law. See *id.* at 84-85.

The complaint also included two PMPA claims. Although the complaint admitted that the dealers were "still conduct[ing] * * * retail operations under written franchise agreements" with Shell or Motiva, J.A. 69, it claimed that the elimination of the rent subsidy had "terminat[ed] the[ir] franchises" in violation of the PMPA, see *id.* at 82. Similarly, although the complaint admitted that Motiva had "offer[ed] renewals" to the dealers (and did not deny that the dealers had accepted those renewals), see *id.* at 58, it alleged that Motiva's adoption of a different method of calculating rent in the new agreements violated the Act's restrictions on non-renewal, see *id.* at 82.[5]

Roughly two years after filing suit, plaintiffs moved for a preliminary injunction ordering Motiva to reduce their rents. J.A. 124. The district court denied the motion. It observed that the "defendants did not terminate or fail to renew any of plaintiffs' leases"; rather, "[a]ll

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[4] Six dealers and an unincorporated association named the "Shell Dealers Defense Group" had previously sued Shell and Motiva in June 2000, but the association was found to lack standing. C.A. App. 3798-3804, 3863. This suit was filed by dealers purporting to be members of that association. J.A. 55.

[5] Plaintiffs also alleged that Shell and Motiva had violated U.C.C. § 2-305 by charging too much for fuel under the open price terms of their supply agreements. See J.A. 63, 77-80.

plaintiffs have signed new lease agreements." *Ibid.* And it held that "a preliminary injunction [was] inappropriate" because the dealers had "waited years before seeking preliminary injunctive relief." *Id.* at 125.

Shell and Motiva moved to dismiss and later moved for summary judgment, arguing that plaintiffs had not been "terminated" or "non-renewed" within the meaning of the PMPA because they had "renewed their franchise relationships with Defendants and continued in operation." Def. C.A. Supp. App. 8. The court denied both motions in relevant part. J.A. 88, 132.

2. The district court selected eight of the 63 plaintiffs—the parties here—to proceed to trial first. J.A. 122.[6] A 15-day jury trial began on November 15, 2004. *Id.* at 24. Consistent with their complaint, the dealers urged that their franchise agreements had been "constructively terminated" in violation of the PMPA when Motiva ended the rent subsidy in January 2000. See *id.* at 432. And the dealers contended that Motiva had "constructively non-renewed" their franchise relationships when, as each dealer's agreement expired, Motiva offered a new agreement that calculated rent using the new asset-based formula. See *id.* at 432-433.

Notwithstanding those claims, four of the eight dealers—Mac's Shell, Prashad, Karol, and Akmal—testified that they were still operating their Shell stations at the time of trial, 58 months after their alleged "termination." J.A. 138-139, 154, 161, 185. They also acknowledged that they had signed renewal agreements with Motiva when

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[6] The court initially selected 10 dealers, J.A. 122, but one lost on summary judgment and another settled, see *id.* at 135; C.A. App. 805, 809-810.

their old agreements expired during that 58-month period. *Id.* at 139, 155, 164, 186-187.[7]

Three dealers—Avramidis, RAM, and Sullivan—had continued to operate their stations throughout the stated terms of their franchise agreements after the subsidy ended; they then signed renewal agreements with Motiva when those old agreements expired and operated under the new agreements. Avramidis, for example, signed a new Motiva agreement on January 7, 2002; he then operated his station until April 30, 2004—52 months after the rent subsidy ended. J.A. 190, 193, 312-313.[8]

The last dealer, Pisarczyk, operated under an extension to his old Shell agreement until July 2000, seven months after the subsidy ended and five months before his franchise expired. See J.A. 204, 330-331. His son then purchased the property from Motiva to convert it into a garden center. *Id.* at 206-207. Pisarczyk testified that he had been planning to convert the station before the subsidy ended; he did not claim his decision to leave the service-station business had anything to do with the elimination of the rent subsidy or the new rent formula. See *id.* at 201-207; C.A. App. 1070-1078.[9]

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[7] Mac's Shell signed new agreements for its two stations on October 23, 2001. J.A. 316-321. Prashad signed an agreement on July 13, 2000. *Id.* at 268-269. Karol signed an agreement on December 21, 2000. *Id.* at 314-315. And Akmal signed an agreement on December 18, 2003. *Id.* at 310-311.

[8] RAM's owner signed a new agreement on May 10, 2001, and then operated until September 2001, when he sold the franchise to a third party. J.A. 179-182, 322-323. Sullivan signed a new agreement on May 3, 2000, and then operated until September 2000, when he sold the franchise back to Motiva. *Id.* at 148-153, 324-325.

[9] Some dealers signed the new agreements under protest. The owner of Mac's Shell wrote "[s]igned under protest or if not accept-

To support their constructive termination (and related breach-of-contract) claims, the dealers testified that—notwithstanding the express written terms permitting Shell to end the rent subsidy on 30 days' notice—Shell sales representatives had assured them that "the Subsidy or something like it would always exist, the contract rent was to be disregarded, and the cancellation provision was only intended to be invoked in a situation like a war or an oil embargo." J.A. 431; see, *e.g.*, *id.* at 136-138, 146-148. Although the franchise agreements included integration clauses that required any modifications to be in writing, see *id.* at 263, the dealers claimed that they relied on the alleged oral modifications when investing in their businesses, see, *e.g.*, *id.* at 138. Shell and Motiva vigorously disputed those claims, denying that their representatives had ever promised that the rent subsidy would be permanent. See *id.* at 230-231; C.A. App. 3596, 3723.

To support their constructive non-renewal claims, the dealers attempted to show that Motiva adopted the new asset-based rent structure to drive them out of business and take over their stations. The dealers presented evidence that Shell and Motiva had plans to increase the number of company-owned stations in some areas, in part by repurchasing franchises from dealers if "mutually agreeable" terms could be reached. See, *e.g.*, J.A. 175-

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able under protest then I sign without protest" on his new agreements. J.A. 316-321. Three others sent correspondence protesting the agreements. See J.A. 148-149; C.A. App. 2128, 2132. Another claimed he had signed under protest by participating in the suit. J.A. 191. The other two did not testify that they had signed under protest. To the contrary, one stated that the new agreement "gave [her] hope" because her new Motiva rent was lower than the Shell contract rent she had been paying after the subsidy ended. *Id.* at 143-144. And the other testified that the appraised value used to calculate his rent was "about right." *Id.* at 159.

176; C.A. App. 925-926, 930-931. Shell and Motiva's witnesses, by contrast, testified that the rent changes were motivated by the need to develop a uniform rent structure after Shell and Texaco combined their operations to form Motiva. See, *e.g.*, J.A. 218-219, 402-403; C.A. App. 3608, 3786; p. 8, *supra*. The new rent structure was also more consistent with prevailing industry practices. See, *e.g.*, J.A. 217-219, 402-403; p. 8, *supra*.[10]

A former Mobil employee, Jeffrey Bernard, testified as an expert for the dealers that Motiva's rents exceeded industry standards. See J.A. 195-196. Bernard claimed that Mobil based its rents on 8% of the value of the land, buildings, and equipment (*i.e.*, an "8-8-8" formula), and that he had heard that Sunoco and Cumberland had rents "consistent" with Mobil's. See *id.* at 195-200. But the ExxonMobil manager responsible for rent programs testified that, shortly after Bernard left in 2000, the company changed its formula to "10-10-10" in 2001 and then "12-12-12" in 2003—*more* than Motiva's "10-12-12" formula. *Id.* at 223-225. Sunoco also charged "12-12-12" by 2002. *Id.* at 225-226. Cumberland's contracts manager testified that his company charged "11-11-11" from 1998 through 2003. *Id.* at 228. And an economics professor surveyed formulas at seven major companies and found

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[10] Moreover, although plaintiffs contended that the new Motiva agreements "result[ed] in a further increase in rent," J.A. 431, evidence showed that the Motiva asset-based rents were *lower* on average than the "contract rents" under the old Shell leases—only elimination of the subsidy increased the dealers' net rents, see *id.* at 220-222. For example, Karel's net annual rent increased from $59,447 to $99,120 when the subsidy ended, but fell back to $66,371 under the new Motiva lease. See J.A. 336.

them consistent with Motiva's. See *id.* at 236-238; C.A. App. 3581.[11]

The dealers also described hardships they experienced under the new rents. One, for example, stated that she had to borrow money and withdraw savings to stay in business. J.A. 140-141. Another claimed "mental anguish." *Id.* at 150. Some dealers, however, remained quite profitable. For example, for the four years after the subsidy ended, Mac's Shell averaged more than $200,000 per year in net income and owner compensation from its two Shell stations (and a related towing service operated using station employees and facilities). *Id.* at 166-173, 348. RAM's net income doubled to $57,000 the year after the subsidy ended; according to the owner, the station "looked pretty good profit-wise." *Id.* at 182-184, 349. And Karol earned more in 2001 under the new Motiva agreement than in any year under the original subsidy since 1994. *Id.* at 141-143, 352; see p. 13 n.10, *supra*.

3. The district court instructed the jury that it could find a "termination" under the PMPA even if a dealer continued to operate its franchise. Elimination of the subsidy could amount to a "constructive termination," the court directed, if it was "such a material change that it effectively ended the lease, even though the plaintiffs continue to operate the business." J.A. 373. The court similarly instructed that a dealer could claim "nonrenewal" despite having been offered, and having accepted, a renewal agreement. "[E]ven though the franchisor says it wants to renew" and "[e]ven if the plaintiffs signed the agreement and continued to operate the business," the court stated, the jury could find a "constructive

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[11] Experts also disagreed over whether the appraisals Motiva used to calculate rent were too high. See C.A. App. 1040-1041, 1240-1244.

nonrenewal" if the "rent increases and other new provisions in the Motiva leases [were] designed to discourage the plaintiffs from renewing and to enable Motiva to convert the stations * * * to company-owned ones." *Id.* at 374-375.[12]

The jury found Shell and Motiva liable on all counts to all plaintiffs, awarding damages of $3.3 million, including $1.3 million for constructive termination and $1.2 million for constructive non-renewal. J.A. 376-386.[13] Both before and after the verdict, Shell and Motiva moved for judgment as a matter of law, arguing that "'[t]he plain language of the statute contemplates an actual ending of the franchise relationship'"—something the dealers had failed to show. See *id.* at 208-213, 387-399. The court denied those motions. See *id.* at 403-404; C.A. App. 1122, 1278. The court also awarded $1.16 million in attorney's fees and $209,000 in expert witness fees under the PMPA. J.A. 426-428. It entered a final judgment under Federal Rule of Civil Procedure 54(b). *Id.* at 405-406.

C. The Court of Appeals' Decision

The court of appeals affirmed in part and reversed in part. J.A. 429-462.

1. Addressing the dealers' "termination" claims, the court held that there was sufficient evidence that cancellation of the rent subsidy amounted to a "constructive

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[12] Shell and Motiva objected to both instructions. See J.A. 368-369 (no termination unless "you lose one of the three [statutory franchise] elements"); *id.* at 369-371 ("[T]he case law is very clear that there isn't such a thing as constructive nonrenewal."); *id.* at 356-359 (proposed instructions).

[13] The jury also awarded $1.3 million for breach of contract, but those damages were duplicative of the constructive termination award. See J.A. 376-379, 424 n.2. The other $800,000 related to the state-law fuel pricing claims. See *id.* at 384-386; p. 9 n.5, *supra*.

termination." J.A. 444-450. A dealer could establish constructive termination, the court ruled, by showing that an assignment of its franchise led to a "'breach[ ] [of] one of the three statutory components of the franchise agreement'"—namely, "'the contract to use the refiner's trademark, the contract for the supply of motor fuel, or the lease of the premises.'" *Id.* at 444-445. The court held that, in this case, "the Dealers have proven to the jury's satisfaction that Motiva breached the lease component of the franchise agreements" by ending the subsidy, thereby "allow[ing] the jury to find that Shell constructively terminated the Dealers' franchises when it assigned the franchises to Motiva." *Id.* at 445-446.

The court rejected the argument that a breach of contract cannot amount to a termination under the PMPA where, as here, the plaintiff continues to operate its franchise. Relying on *Barnes* v. *Gulf Oil Corp.*, 795 F.2d 358 (4th Cir. 1986), the court held that the breach "does not have to be a total breach" and "need not result in complete deprivation of a statutory element of the franchise to support a constructive termination." J.A. 446-447. Although the court did not hold that "any material breach of the lease would necessarily be sufficient," it stated that the district court had set an "appropriate threshold" by requiring a "breach of the lease [that] 'was such a material change that it effectively ended the lease, even though the plaintiffs continued to operate the business.'" *Id.* at 447.

The court acknowledged that its ruling was inconsistent with the concept of "constructive" termination in other areas of the law, where a plaintiff must show an "actual severance of the relationship." J.A. 446. An employee claiming constructive discharge "must leave the workplace"; a tenant claiming constructive eviction "must

move out." *Ibid.* But service stations are different, the court held, because "sunk costs, optimism, and the habit of years might lead franchisees to try to make the new arrangements work, even when the terms have changed so materially as to make success impossible." *Id.* at 446-447. "To require an actual abandonment of years of work and investment before we recognize a right of action under the PMPA would be unreasonable." *Id.* at 447.

2. Turning to the "non-renewal" claims, the court held that "the PMPA does not support a claim for nonrenewal under these circumstances," where "each Dealer signed a new agreement (albeit 'under protest')." J.A. 450. The court noted that "[t]he Ninth Circuit is the only circuit so far to recognize a claim for constructive nonrenewal." *Id.* at 451 (citing *Pro Sales, Inc.* v. *Texaco, U.S.A.*, 792 F.2d 1394 (9th Cir. 1986)). And that court's approach "has been rejected by the other circuits to consider the issue," including the Seventh Circuit in *Dersch Energies, Inc.* v. *Shell Oil Co.*, 314 F.3d 846 (7th Cir. 2002), and the Fifth Circuit in *Abrams Shell* v. *Shell Oil Co.*, 343 F.3d 482 (5th Cir. 2003). J.A. 451.

Dersch and *Abrams Shell* had explained that allowing "constructive non-renewal" claims despite renewal of the franchise relationship would be inconsistent with the Act's elaborate notice-and-preliminary-relief provisions. J.A. 451-452. Under the Act, a dealer confronting objectionable contract terms can refuse to sign the new agreement; if there is an impasse, the franchisor must send a notice of non-renewal based on the failure to agree at least 90 days before the non-renewal takes effect. See 15 U.S.C. §2804(a). The dealer, upon receiving that notice, can seek a preliminary injunction during the 90-day period to preserve the status quo while the court determines the legality of the proposed terms. See *id.*

§ 2805(a)-(b). "[T]his notice-and-preliminary-relief structure is evidence that Congress intended to limit the reach of the PMPA to cases where either a notice is given or an actual nonrenewal has taken place." J.A. 451.

The dealers here, however, chose not to invoke that statutory mechanism. "[R]ather than insist on receiving notices of nonrenewal, the Dealers signed the new agreements 'under protest' and continued in operation under the new agreements." J.A. 452. That was inconsistent with Congress's design. "[J]ust as the PMPA requires a clear indication from franchisors that they seek nonrenewal of a franchise relationship, it likewise requires that franchisees faced with objectionable contract terms refrain from ratifying those terms by executing the contracts (even 'under protest') and operating under them." *Id.* at 452-453. A contrary rule "would enable a franchisee to sign the contract and simultaneously challenge it," permitting dealers to operate their franchises while speculating on legal claims and subjecting franchisors to unwarranted uncertainty. *Id.* at 453. The court thus refused to "recognize a claim for nonrenewal under the PMPA where the franchisee has signed and operates under the renewal agreement complained of." *Id.* at 454. The court accordingly reversed the judgment on the nonrenewal claims, affirmed on the termination claims, and vacated and remanded the fee award "for reconsideration in light of [its] mixed disposition of the claims under the PMPA." *Id.* at 462.[14]

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[14] The court rejected Shell and Motiva's remaining arguments, including challenges to the suit's timeliness, J.A. 436-441, to the state-law claims, *id.* at 441-444, 454-457, and to the damages calculation, *id.* at 458-462.

3. The court of appeals denied rehearing and rehearing en banc. J.A. 463-464. The dealers filed a petition for a writ of certiorari seeking review of the court's non-renewal ruling, and Shell and Motiva filed a petition seeking review of the termination ruling. This Court granted both petitions. 129 S. Ct. 2788, 2789.

SUMMARY OF ARGUMENT

Shell and Motiva's position in this case can be summarized as follows: "Terminate" means "terminate" and "fail to renew" means "fail to renew." Consequently, a service-station dealer that continues as a franchisee, receiving all three elements of its franchise—trademark, lease, and fuel—cannot claim it was "terminated" within the meaning of the PMPA. Likewise, a dealer that is offered and executes a renewal agreement cannot claim that the franchisor "failed to renew" the relationship.

I. A. By its plain terms, the PMPA applies only where a defendant "terminate[s]" a franchise or "fail[s] to renew" a franchise relationship. 15 U.S.C. § 2802(a). To "terminate" something is to "put an end" to it. A dealer that continues as a franchisee has not been "terminated" in any sense of the term.

The PMPA, moreover, was enacted in response to complaints about unfair "terminations" and "non-renewals" of franchises. S. Rep. No. 95-731, at 17 (1978). The Act thus "define[s] the rights and obligations of the parties * * * in the crucial area of *termination* of a franchise or *non-renewal* of the franchise relationship," leaving other aspects of the relationship to state law. *Id.* at 19, 42 (emphasis added).

The court of appeals' contrary holding—that a dealer can sue for "termination" despite "'continu[ing] to operate the business,'" J.A. 447—subjects franchisors and franchisees to an unintelligible legal standard. It also

disrupts the federal-state balance, extending federal preemption into a domain traditionally reserved to the States. And it distorts the resolution of franchise disputes by inviting dealers to recast ordinary contract claims as federal PMPA violations.

B. 1. A dealer that continues operating its franchise cannot avoid the statutory "termination" requirement by claiming "constructive termination." The Act's text, legislative history, structure, and context all confirm that Congress addressed *actual* terminations, not constructive ones. Moreover, courts that have allowed constructive termination claims under the PMPA have relied on an assignment-based theory that is patently incoherent.

2. In any event, even a "constructive termination" would require an end to the franchise. An employee claiming constructive discharge "must leave the workplace"; a tenant claiming constructive eviction "must move out." J.A. 446. The terminations are "constructive" only in the sense that the plaintiff is driven out by oppressive conditions rather than being expressly ordered out. Likewise here, a franchisee cannot claim it was constructively terminated unless it abandons the franchise.

C. The evidence failed to establish that Shell or Motiva "terminated" any of the eight dealers in this case. Four dealers were still operating their Shell stations at the time of trial, almost *five years* after their alleged "termination," earning as much as $200,000 a year. Three others continued as franchisees throughout their franchise terms. And the eighth left the service-station business for unrelated reasons. There can be no "termination," constructive or otherwise, where a dealer continues to operate its franchise for the agreement's full term or leaves for reasons unrelated to the franchisor.

II. A. The court of appeals properly rejected the non-renewal claims. The PMPA applies only where a franchisor "fail[s] to renew" the franchise relationship. 15 U.S.C. §2802(a)(2). A dealer that is offered and accepts a renewal agreement cannot claim the franchisor "failed to renew" the relationship. The Act, moreover, contains a comprehensive scheme for resolving renewal disputes. That scheme requires franchisors to give 90 days' notice of any non-renewal, and allows dealers to obtain a preliminary injunction under a relaxed standard so that a court can evaluate the proposed renewal terms before the non-renewal takes effect. Allowing dealers to sign renewal agreements while simultaneously challenging them in court frustrates Congress's carefully balanced structure.

B. That same scheme also rebuts the argument that constructive non-renewal claims are necessary to protect dealers. The PMPA's notice requirement affords dealers confronted with objectionable renewal terms ample time to obtain relief under the Act's liberal injunctive provisions.

C. Finally, Motiva did not "fail to renew" the eight dealers here. Seven were offered and signed renewal agreements. And the eighth left the service-station business five months before his franchise term ended.

ARGUMENT

Enacted in response to franchisees' complaints about unfair terminations and non-renewals, the Petroleum Marketing Practices Act by its terms provides that a franchisor cannot "terminate" a franchise agreement during its stated term, or "fail to renew" a franchise relationship at the end of the term, except on particular grounds following specified procedures. 15 U.S.C. §2802(a). The PMPA does not federalize all aspects of

petroleum franchise relationships. Instead, the Act—and the private cause of action it creates—is limited to the "crucial" relationship-ending events of "termination" and "non-renewal." S. Rep. No. 95-731, at 19 (1978).

The decision below is only partially faithful to Congress's design. The First Circuit properly concluded that, where the parties renew the franchise relationship by executing a new agreement, the dealer cannot claim that the franchisor "fail[ed] to renew" the relationship in violation of the PMPA. See J.A. 450-454. But the court erroneously held that a dealer can claim it was "terminate[d]" even where the dealer continues to operate its franchise—occupying the same premises, receiving the same gasoline, and using the same trademark. See *id.* at 444-450. Indeed, the court upheld the verdict for four dealers here even though they were still operating their Shell stations at the time of trial, almost *five years* after the alleged "termination," earning as much as $200,000 a year. And the court upheld the verdict for three other dealers even though they operated for months or years after the alleged termination, through the end of their franchises' stated terms.

That ruling cannot be reconciled with the statutory text, which requires "terminat[ion]" of a franchise, not an alleged breach of an ongoing franchise agreement. 15 U.S.C. §2802(a)(1). It ignores Congress's limited purpose of "defin[ing] the rights and obligations of the parties * * * in the crucial area of termination of a franchise"—not federalizing all petroleum franchise regulation. S. Rep. No. 95-731, at 19. The ruling subjects both franchisors and franchisees to an unintelligible legal standard. It expands federal preemption deep into an area traditionally governed by state law. And it cannot

be reconciled with the court of appeals' rejection of the parallel non-renewal claims.

I. A DEALER THAT CONTINUES AS A FRANCHISEE CANNOT CLAIM IT WAS "TERMINATED" IN VIOLATION OF THE PMPA (NO. 08-372)

The PMPA by its terms applies only where a franchisor "terminate[s]" a franchise or "fail[s] to renew" a franchise relationship. 15 U.S.C. §2802(a). The dealers in this case claim they were "terminated" when Motiva withdrew a rent subsidy, as permitted by the written program terms but allegedly in violation of oral promises that the subsidy would last forever. The dealers, however, continued as franchisees; they were never denied use of the Shell trademark, premises, or fuel. Their franchises therefore were not "terminated" within the meaning of the Act.

A. The PMPA Makes Clear That a "Termination" Requires an Actual End to the Franchise

1. *The PMPA's Text Is Unambiguous*

This Court has "stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Conn. Nat'l Bank* v. *Germain*, 503 U.S. 249, 253-254 (1992). "When the words of a statute are unambiguous, * * * [the] 'judicial inquiry is complete.'" *Id.* at 254. "When terms used in a statute are undefined," moreover, this Court "give[s] them their ordinary meaning." *Asgrow Seed Co.* v. *Winterboer*, 513 U.S. 179, 187 (1995).

Here, the statute could not be more clear. The PMPA states that a franchisor may not "*terminate* any franchise" except on particular grounds following specified procedures. 15 U.S.C. §2802(a)(1) (emphasis added). In any suit, "the franchisee shall have the burden of proving the *termination* of the franchise." *Id.* §2805(c) (empha-

sis added). To "terminate" something means to "put an end" to it. *Black's Law Dictionary* 1609 (9th ed. 2009); *Webster's New International Dictionary of the English Language* 2605 (2d ed. 1954) (same). Accordingly, there can be no "termination" within the meaning of the statute unless the franchise is "put [to] an end." The Act also provides that "[t]he term 'termination' includes cancellation." 15 U.S.C. §2801(17). But the ordinary meaning of "cancel" is essentially the same: to "annul or destroy." *Webster's*, *supra*, at 389. Consequently, the Act does not apply unless the franchise has been "put [to] an end," "annul[led]," or "destroy[ed]."

The Act defines the "franchise" in terms of three elements—the right to use the franchisor's trademark, the right to obtain motor fuel, and the right to occupy the premises. See 15 U.S.C. §2801(1)(A)-(B). Thus, for a termination to occur, at least one of those three elements must be brought to an end. For that reason, courts have routinely rejected the argument that a mere breach of contract by a franchisor can amount to a "termination" where the dealer continues in business, occupying the same premises, receiving the same fuel, and using the same trademark. See, *e.g.*, *Clark* v. *BP Oil Co.*, 137 F.3d 386, 392 (6th Cir. 1998); *Portland 76 Auto/Truck Plaza, Inc.* v. *Union Oil Co. of Cal.*, 153 F.3d 938, 948 (9th Cir. 1998); *McGinnis* v. *Star Enter.*, No. 93-1234, 1993 WL 455587, at *4 (5th Cir. Oct. 21, 1993).

In *Clark*, for example, the Sixth Circuit rejected a claim that a franchisor had "terminated" a franchise by charging more for fuel than the franchise agreement allowed. "[E]ven if [the dealer] can establish a breach of the price term," the court explained, "it does not trigger the protections of the PMPA since he still retains use of BP's trademark, use of the Emerald-Mart premises, and

continues to receive BP-branded motor fuel." 137 F.3d at 392. Similarly, in *Portland 76*, the court held that a dealer could not establish a termination because it had "stayed in business until the time came for renewal." 153 F.3d at 948. And in *McGinnis*, the Fifth Circuit rejected a claim for termination where the plaintiff "continued as a franchisee." 1993 WL 455587, at *4; cf. *Abrams Shell* v. *Shell Oil Co.*, 343 F.3d 482, 486-487 (5th Cir. 2003) (characterizing statement as dictum). Other courts have agreed. See, *e.g.*, *Jet, Inc.* v. *Shell Oil Co.*, No. 02 C 2289, 2002 WL 31641627, at *3-5 (N.D. Ill. Nov. 22, 2002), aff'd on other grounds, 381 F.3d 627 (7th Cir. 2004); *Deamor, Inc.* v. *Mobil Oil Corp.*, No. 90-2227, 1990 WL 124927, at *1 (E.D. Pa. Aug. 23, 1990). Those decisions recognize what is clear from the statutory text: A dealer that continues operating and is not denied any of the three elements of its franchise—trademark, premises, or fuel—has not been "terminated" in any sense of the term.

While the ordinary meanings of "terminate" and "cancel[ ]" are dispositive, their technical meanings require the same result. When Congress uses a term of art, this Court presumes that Congress "intended it to have its established meaning." *McDermott Int'l, Inc.* v. *Wilander*, 498 U.S. 337, 342 (1991). The Act's seemingly tautological statement that "[t]he term 'termination' includes cancellation," 15 U.S.C. §2801(17), suggests that Congress may have been using those terms in a technical sense here.

"Termination" and "cancellation" have established meanings under the Uniform Commercial Code. They describe two distinct ways of putting an end to a contract. A "'[t]ermination' occurs when either party pursuant to a power created by agreement or law puts an end to the contract otherwise than for its breach," while a "'[c]an-

cellation' occurs when either party puts an end to the contract for breach by the other." U.C.C. §2-106(3)-(4); see also 13 S. Jenkins, *Corbin on Contracts* §67.2, at 8-12 (rev. ed. 2003). In other words, a party "cancels" a contract by ending it because the other party breached, and "terminates" a contract by ending it for other reasons.

That dichotomy explains Congress's otherwise seemingly superfluous clarification that "[t]he term 'termination' includes cancellation." 15 U.S.C. §2801(17).. Congress was concerned that franchisors might insist on expansive contractual rights that would enable them to end a franchise over "technical or minor violations" by the franchisee (a "cancellation" in the U.C.C.'s parlance). S. Rep. No. 95-731, at 17-18. (That is why the Act permits termination for breach only if the provision breached is "reasonable and of material significance." 15 U.S.C. §2802(b)(2)(A).) By specifying that "'termination' includes cancellation," Congress foreclosed any argument that termination for breach is not covered because it technically constitutes a "cancellation" rather than a "termination."

Most important here, Congress's use of those terms underscores the PMPA's limited scope. While "termination" and "cancellation" differ in how the contracting party justifies its actions, both require that the party "*put[] an end* to the contract." U.C.C. §2-106(3)-(4) (emphasis added). "[T]ermination and cancellation of an agreement *extinguish future obligations of both parties* * * *." 13 *Corbin on Contracts*, *supra*, §67.2, at 12 (emphasis added). A mere breach of contract thus cannot be deemed a "termination" where both parties continue to perform. See, *e.g.*, *Comedy Club, Inc.* v. *Improv West Assocs.*, 553 F.3d 1277, 1289 & nn.12-13 (9th Cir. 2009) (although "a material breach * * * may give grounds for

the non-breaching party to cancel the contract," "[a] breach by a party to a contract does not in itself cancel the contract"). A dealer that continues to operate—receiving all three elements of its franchise—has not been "terminated" in either the ordinary or technical sense of the term.

2. *The Legislative History Confirms That Congress Meant What It Said*

To the extent legislative history is relevant, it confirms the Act's limited scope. Congress enacted the PMPA in response to "numerous complaints by franchisees of unfair *terminations* or *non-renewals* of their franchises." S. Rep. No. 95-731, at 17 (emphasis added); see H.R. Rep. No. 95-161, at 14 (1977). Legislators were concerned that dealers "may find their contracts *canceled* simply because a company chooses to *end* the franchise relationship." 124 Cong. Rec. 12,761 (1978) (statement of Sen. Durkin) (emphasis added); see also 123 Cong. Rec. 10,383-84 (1977) (statement of Rep. Long); *Petroleum Marketing Practices Act: Hearing on S. 19, S. 743, and H.R. 130 Before the Subcomm. on Energy Conservation and Regulation of the S. Comm. on Energy and Natural Resources*, 95th Cong. 173, 185 (1977) ("*Senate Hearing*") (statement of Charles Binsted).

Congress drafted the statute to address those specific problems. It sought to "define the rights and obligations of the parties to the franchise relationship in the crucial area of *termination* of a franchise or *non-renewal* of the franchise relationship." S. Rep. No. 95-731, at 19 (emphasis added); see H.R. Rep. No. 95-161, at 16. Congress did not consider other aspects of the franchise relationship unimportant. It merely left their regulation to state law: "State laws dealing with [other] aspects of the relationship are not preempted." S. Rep. No. 95-731, at 42.

Here, for example, the dealers claimed that elimination of the rent subsidy "constructively terminated" their franchises, but also relied on the same allegations to claim breach of contract. See p. 9, *supra*. The jury found in their favor on both sets of claims, returning duplicative awards of $1.3 million on each. See p. 15 & n.13, *supra*. The "constructive" claims thus were hardly necessary to provide meaningful relief. "[T]he PMPA was enacted to address one narrow, yet crucial, aspect of petroleum franchise relationships—the termination of franchises and the nonrenewal of franchise relationships." *Dersch Energies, Inc.* v. *Shell Oil Co.*, 314 F.3d 846, 859 (7th Cir. 2002). It was not designed to turn every franchise dispute into a federal case.

3. *The Court of Appeals' Contrary Ruling Renders the Statute Unintelligible and Disrupts the Federal-State Balance*

In enacting the PMPA, Congress sought to "*clearly define* the rights and obligations of the parties." S. Rep. No. 95-731, at 19 (emphasis added). But the court of appeals' interpretation renders the statute unintelligible. It simply is not possible to determine whether a "termination" has occurred if the word "terminate" does not require an end. Here, for example, the district court instructed the jury—and the court of appeals held—that elimination of the rent subsidy could amount to a "termination" if it was "'such a material change that it effectively ended the lease, even though the plaintiffs continued to operate the business.'" J.A. 447 (quoting J.A. 373). Nowhere did either court explain how a breach could "effectively end[]" a franchise when the plaintiff "continue[s] to operate" it. That incoherent standard allows dealers to allege PMPA claims in virtually any contract dispute. Indeed, four dealers here were still operat-

ing their Shell stations at the time of trial, five years after their alleged "termination," and earning as much as $200,000 a year doing so. See pp. 10, 14, *supra*. If the record supports a finding of "termination" here, it is hard to imagine a case where it would not.

The court of appeals' interpretation, moreover, would disrupt the traditional federal-state balance. "[T]he regulation of petroleum franchise relationships has traditionally been a matter of local concern in which the parties frame their relationships with reference to State law." *Dersch*, 314 F.3d at 861. "Congress enacted the PMPA to federalize the standards by which petroleum franchises are terminated and petroleum franchise relationships are nonrenewed, not to create a federal common law for governing petroleum franchise agreements." *Id.* at 861-862. The Act thus extends federal law only into a narrow field—termination and non-renewal. 15 U.S.C. § 2802(a).

By expanding the meaning of "terminate" to cover a host of additional circumstances, the decision below extends federal law into a domain reserved to the States. Moreover, because the PMPA preempts inconsistent state laws respecting "termination," 15 U.S.C. § 2806(a), that expansion of federal authority affirmatively ousts state law. As this Court has cautioned, "unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance." *United States* v. *Bass*, 404 U.S. 336, 349 (1971). The court of appeals' expansive construction, however, has precisely that effect.

That intrusion has a profound effect on the resolution of franchise disputes. The PMPA provides remedies that contract law typically does not. It permits punitive damages, 15 U.S.C. § 2805(d)(1)(B), which are ordinarily

barred on contract claims, *Barnes* v. *Gorman*, 536 U.S. 181, 187-188 (2002). Courts *must* award attorney's fees and expert witness fees whenever a plaintiff recovers more than nominal damages, 15 U.S.C. §2805(d)(1)(C), contrary to the normal "American Rule," see *Alyeska Pipeline Serv. Co.* v. *Wilderness Soc'y*, 421 U.S. 240, 247 (1975). And the PMPA's standard for injunctive relief is more "lenient" than the norm. See *Dersch*, 314 F.3d at 862-863 & n.16 (citing 15 U.S.C. §2805(b)(2)). Plaintiffs thus have every incentive to recast ordinary contract disputes as federal PMPA claims. "[T]he PMPA was not designed to provide franchisees with a federal forum for the resolution of run-of-the-mill contract disputes * * * ." *Id.* at 862. But the First Circuit's approach steers precisely such disputes into federal court.

B. A Dealer That Continues Operating Its Franchise Cannot Avoid the Statutory "Termination" Requirement by Claiming "Constructive Termination"

The court below acknowledged that "no actual termination occurred" in this case, but nonetheless affirmed on a theory of "constructive termination." J.A. 432, 445-446. That theory cannot be reconciled with the statutory text. Nothing in the PMPA covers "constructive," as opposed to "actual," terminations. But even if the Act created a cause of action for "constructive termination," "constructive" terminations would still require an end to the franchise. As the court of appeals recognized, an employee claiming "constructive" discharge or a tenant claiming "constructive" eviction must show "an actual severance of the relationship": "The employee must leave the workplace; the tenant must move out." *Id.* at 446. The termination is "constructive" only in the sense that the plaintiff is compelled to leave by oppressive conditions rather

than being expressly fired or evicted. That same requirement of an actual end must govern here as well: A dealer that continues to operate its franchise—occupying the same premises, receiving the same fuel, and using the same trademark—has not been "terminated," constructively or otherwise.

1. *The PMPA Does Not Allow Claims for "Constructive Termination"*

a. The PMPA's text does not encompass "constructive terminations." It provides that "*no franchisor* * * * may * * * terminate any franchise" except pursuant to the grounds and procedures set forth. 15 U.S.C. §2802(a)(1) (emphasis added). The Act thus requires, not merely that the franchise *be terminated*, but also that the *franchisor* be the one that terminates it. That language is most naturally read to exclude "constructive" terminations—*i.e.*, situations where the *franchisee* ends the franchise in response to burdensome conduct by the franchisor short of actual denial of a statutory franchise element. See *Moro* v. *Shell Oil Co.*, 91 F.3d 872, 875 (7th Cir. 1996) ("Under the PMPA, the plaintiffs had the burden of proving that Shell, and not the plaintiffs themselves, terminated the franchise."). Indeed, the court of appeals' observation that the dealers here had to proceed on a theory of "constructive termination" because "no actual termination occurred" (J.A. 432) implicitly admits that a "constructive termination" is something other than what the statutory text "actual[ly]" covers.

The legislative history confirms that interpretation. The complaints that prompted Congress to act concerned *actual* terminations, not constructive ones. See S. Rep. No. 95-731, at 17-18; p. 27, *supra*. A franchisee trade group representative expressly noted the Act's limited scope in the Senate hearing: "We fully understand that

this bill deals with only a part of our overall problem. While it will provide needed re[l]ief in so far as the dealer's tenure in the service station is concerned, *it does not deal with the economic terminations* resulting from anticompetitive and other unfair marketing practices engaged in by some suppliers." *Senate Hearing* 185 (statement of Charles Binsted) (emphasis added). That sort of conduct, the representative observed, would have to be addressed by "separate legislation." *Ibid.*

The PMPA's terminology of "termination" and "cancellation," moreover, has roots in the Uniform Commercial Code. See pp. 25-26, *supra*. Nothing in the U.C.C.'s text, its official commentary, the leading treatises, or the cases construing it suggests that the U.C.C.'s definitions of "termination" and "cancellation" encompass "constructive terminations" or "constructive cancellations." See, *e.g.*, U.C.C. §2-106(3)-(4) & cmt. 3; 1 J. White & R. Summers, *Uniform Commercial Code* §3-6, at 215-222 (5th ed. 2006); 1 T. Quinn, *Uniform Commercial Code Commentary Law and Digest* §2-106, at 2-69 to 2-87 (2d ed. 2002). Congress would not have invoked those technical U.C.C. definitions if it had intended to cover constructive terminations.

Case law under state statutes that regulate franchise terminations in other contexts supports the same conclusion. While pre-PMPA case law is essentially lacking, subsequent cases have routinely refused to permit claims for constructive termination under those statutes. In *Coast to Coast Stores, Inc.* v. *Gruschus*, 667 P.2d 619 (Wash. 1983), for example, the Washington Supreme Court rejected a claim for "termination" where a franchisor repossessed the franchisee's inventory, effectively forcing it out of business. The court explained: "[N]ot even * * * the abandonment of the business by the fran-

chisee will terminate the franchise. * * * [A] franchise is terminated only when the agreement between the franchisee and franchisor is brought to an end, terminating the franchisee's right to use the franchisor's trade name, service mark, or the like." *Id.* at 623. Many other courts have reached the same conclusion.[15] Some courts in recent years have expanded those other statutes to cover constructive terminations, see pp. 42-43, *infra*, but at the time Congress enacted the PMPA, franchisees apparently had not even *argued* that those other statutes extended that far.[16]

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[15] See *Fuller Ford, Inc.* v. *Ford Motor Co.*, No. CIV. 00-530-B, 2001 WL 920035, at *13 (D.N.H. Aug. 6, 2001) (statute "does not apply to constructive terminations"); *Morgan Assocs., Inc.* v. *Midwest Mut. Ins. Co.*, 519 N.W.2d 499, 502 (Minn. App. 1994) ("Appellant * * * argues that the effect of the restrictions amounted to a 'constructive termination.' There is no such term in the statute."); *Dave Greytak Enters.* v. *Mazda Motors of Am., Inc.*, 622 A.2d 14, 19-21 (Del. Ch. 1992) (statute "concerns only the express or actual termination or cancellation of * * * a franchise," not "'[e]ffective termination'"), aff'd mem., 609 A.2d 668 (Del. 1992); *Zeno Buick-GMC, Inc.* v. *GMC Truck & Coach*, 844 F. Supp. 1340, 1351 (E.D. Ark. 1992) ("[T]he prohibition goes to actual termination of the franchise rather than to constructive termination."), aff'd mem., 9 F.3d 115 (8th Cir. 1993); *Adolph Coors Co.* v. *Rodriguez*, 780 S.W.2d 477, 480 (Tex. App. 1989) (refusing to "extend the language of [the] termination provisions to include pre-termination wrongs"); *Carlock* v. *Pillsbury Co.*, 719 F. Supp. 791, 852 (D. Minn. 1989) ("Constructive termination of a franchise is not actionable * * * ."); *Speed Auto Sales, Inc.* v. *Am. Motors Corp.*, 477 F. Supp. 1193, 1199 (E.D.N.Y. 1979) (rejecting theory); cf. *Capital Equip., Inc.* v. *CNH Am., LLC*, No. 4:04CV00381, 2004 WL 3406091, at *12 (E.D. Ark. Sept. 27, 2004) (declining to resolve issue).

[16] Many state franchise statutes predate the PMPA, see ABA Section of Antitrust Law, *The Franchise and Dealership Termination Handbook* apps. A-C, at 237-252 (2004), but the earliest reported case we have found—state or federal—addressing a claim for "constructive termination" of a franchise in those terms was a PMPA case decided in 1979. See *Sere* v. *Husky Oil Co.*, 475 F. Supp. 135,

The PMPA's elaborate grounds and procedures for termination confirm Congress's intent. See 15 U.S.C. §§2802, 2804. Those provisions only make sense as applied to *actual* terminations. No franchisor, for example, could be expected to notify a franchisee 90 days before *constructively* terminating it, much less state the grounds therefor. See API Cert. Br. 18-19.

That the PMPA covers only actual, not constructive, terminations does not mean it is limited to formal written or oral terminations. Actions can speak louder than words. A franchisor that refuses to provide the three statutory elements of a franchise—by rescinding trademark rights or cutting off fuel supply, for example—has *actually* "terminated" the franchise, even absent an express statement of termination. Cf. *Dersch*, 314 F.3d at 864 & n.17. But a franchisor that merely commits a breach of the franchise agreement—even a breach that increases the dealer's burdens—has not "terminated" the dealer in any sense.

b. Given all that, it is fair to ask how the theory of "constructive termination" could have arisen under the PMPA. It did not, in fact, derive from any plausible interpretation of the word "terminate." It originated in a view of the law of *assignments* first articulated in *Barnes* v. *Gulf Oil Corp.*, 795 F.2d 358 (4th Cir. 1986). No other court of appeals had actually relied on *Barnes* to sustain a constructive termination claim until this case. None-

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137 (D. Mont. 1979) (rejecting claim without addressing theory's validity). In *American Motors Sales Corp.* v. *Semke*, 384 F.2d 192 (10th Cir. 1967), a court allowed a suit by an automobile dealership driven out of business by its franchisor, but the statute there was not limited to terminations, and the court relied on legislative history addressing abandonment by the franchisee, not "constructive termination." See *id.* at 194-195 & n.1.

theless, *Barnes*'s assignment-based theory has dominated the constructive termination case law under the PMPA. For that reason, nearly every appellate decision even to mention "constructive termination" has involved an assignment. See, *e.g.*, *May-Som Gulf, Inc.* v. *Chevron U.S.A., Inc.*, 869 F.2d 917, 922 (6th Cir. 1989). And courts have refused to apply the doctrine absent an assignment. See, *e.g.*, *Atl. Autocare, Inc.* v. *Shell Oil Prods. Co. LLC*, 605 F. Supp. 2d 463, 468-470 (S.D.N.Y. 2009); *Meghani* v. *Shell Oil Co.*, 115 F. Supp. 2d 747, 755-760 (S.D. Tex. 2000), aff'd mem., 273 F.3d 1098 (5th Cir. 2001); cf. *April Mktg. & Distrib. Corp.* v. *Diamond Shamrock Ref. & Mktg. Co.*, 103 F.3d 28, 30 n.4 (5th Cir. 1997). *Barnes*'s assignment-based theory, however, is utterly incoherent.

The plaintiff in *Barnes* claimed that the franchisor, Gulf, had "constructively terminated" the franchise by assigning it to another entity that "increase[d] the * * * cost of gasoline over the franchise's stipulated price." 795 F.2d at 359. The district court rejected that claim because "Barnes was still in business as a Gulf retailer." *Id.* at 360. The Fourth Circuit reversed, holding that the assignment converted what would otherwise be a breach of contract into a constructive termination. "[E]ven if an assignment of the franchise is authorized by state law," the court held, "the franchisee can obtain relief under the Act if the franchisee can no longer obtain gasoline at the stipulated franchise price." *Id.* at 362. Fuel supply, the court reasoned, is one of the three statutory elements Congress sought to protect, and franchisors should not be allowed to "circumvent the protections the Act affords a franchisee by the simple expedient of assigning the franchisor's obligation to an assignee who increases the franchisee's burden" in violation of the franchise agree-

ment. *Ibid.* The decision below invoked that same theory here, holding that "Motiva breached the lease component of the franchise agreements" and that Motiva's breach "allowed the jury to find that Shell constructively terminated the Dealers' franchises when it assigned the franchises to Motiva." J.A. 445-446.

That makes no sense. The PMPA addresses "terminations," not lawful assignments followed by contract breaches. Reading the Act in accordance with those plain terms does not allow franchisors to "circumvent the [Act's] protections." *Barnes*, 795 F.2d at 362. If conduct would not amount to a "termination" when undertaken by the franchisor itself, the franchisor would not in any sense be "circumvent[ing] the protections [of] the Act" by validly assigning the franchise to someone else who engages in that same conduct. In either instance, the dealer's remedy for any conduct that violates the agreement is a breach-of-contract suit—not an action for "termination" under the PMPA.

Barnes worried that an assignee "might not have the resources to satisfy a judgment." 795 F.2d at 362. But there is no federal interest in ensuring deep pockets to satisfy a state-law breach-of-contract claim. And States are perfectly capable of regulating assignments to prevent franchisors from avoiding state-law responsibilities. See, *e.g.*, U.C.C. §2-210(1)-(2).

That "assignment-plus-breach" theory also defies the statutory text. The PMPA declares in no uncertain terms that it is neutral with regard to state-law assignment rights: "Nothing in this [Act] authorizes any transfer or assignment of any franchise or prohibits any transfer or assignment of any franchise as authorized by the provisions of such franchise or by any applicable provision of State law * * * ." 15 U.S.C. §2806(b)(1). When a

speaker at the House hearing expressed concern that the Act would "create a new right of assignment," the subcommittee chair responded: "I would make it very clear at this point, just so that the record does not get confused, that is not the intention of the legislation * * * ." *Petroleum Marketing Practices: Hearings on H.R. 130 et al. Before the Subcomm. on Energy and Power of the H. Comm. on Interstate and Foreign Commerce*, 95th Cong. 219 (1977) (statement of Rep. Dingell). After quoting § 2806(b)(1) in full, he added: "I want our legislative history clear: *it is neutral*." *Ibid.* (emphasis added); see also H.R. Rep. No. 95-161, at 32 ("[T]he provisions of the title are not to be construed as authorizing any transfer or assignment of a franchise. Neither, however, are the provisions of the title to be construed as prohibiting any transfer or assignment of a franchise * * * ."); S. Rep. No. 95-731, at 42-43 ("[A]s a general rule, assignability of franchises is a matter left to State law."). Given that neutrality, it is impossible to read the PMPA as transforming what would otherwise be mere contract breaches into violations of federal law merely because they are preceded by valid assignments.

Barnes quoted another passage of the Senate Report stating that "'there is an area in which Federal termination provisions under this legislation and State-granted rights of assignability of a franchise may conflict.'" 795 F.2d at 362 (quoting S. Rep. No. 95-731, at 43). Courts, the report asserted, should apply "'general principles of equity'" to resolve those conflicts. *Ibid.* Even assuming that statement accurately reflects the law,[17] the only

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[17] This passage of the Senate Report is omitted from the otherwise often identical House Report, see H.R. Rep. No. 95-161, at 32-33, and is hard to square with the statutory text, 15 U.S.C. § 2806(b)(1).

"area" of potential "conflict" the report identifies concerns *actual* terminations. The two examples it gives—a franchisee that assigns its franchise to avoid a termination, and a franchisor that actually terminates a franchisee to frustrate a valid assignment by the franchisee—make that clear. See S. Rep. No. 95-731, at 43. Nothing in that discussion (let alone the statutory text) suggests that "general principles of equity" can transmogrify ordinary contract breaches into "constructive terminations" merely because they follow valid assignments.

Barnes also stated that an assignment is "tantamount to a constructive termination" if it *violates* state law. 795 F.2d at 363. The plaintiff in *Barnes* argued that the assignment there was invalid because the assignee charged more for fuel, invoking a U.C.C. provision prohibiting assignments that materially increase the other party's burdens. See *ibid.* (citing Virginia's version of U.C.C. §2-210). *Barnes* approved that theory. The PMPA, the court noted, defines "franchise" to include (among other things) "'the unexpired portion of any franchise * * * which is transferred or assigned *as authorized* by * * * State law,'" *ibid.* (quoting 15 U.S.C. §2801(1)(B)(iii)) (emphasis added), and does not "'authorize[] any transfer or assignment'" that state law prohibits, *ibid.* (quoting 15 U.S.C. §2806(b)(1)). "Implicit in these provisions," the court asserted, "are the concepts that an assignment that is unauthorized by state law is prohibited and that the unexpired portion of a franchise that has been invalidly assigned is no longer a franchise as defined by the Act." *Ibid.*

That "invalid assignment" theory is similarly unsupportable and cannot sustain the judgment here.[18] The Act does not authorize assignments that are prohibited by state law. 15 U.S.C. §2806(b)(1). But that does not mean that "an assignment that is unauthorized by state law is prohibited" *by the PMPA*. *Barnes*, 795 F.2d at 363. The PMPA is neutral with respect to assignments; it does not convert every violation of state assignment law into a federal PMPA claim. See pp. 36-37, *supra*.

Nor is there any merit to *Barnes*'s suggestion that an invalid assignment constructively terminates a franchise because "the unexpired portion of a franchise that has been invalidly assigned is no longer a franchise as defined by the Act." 795 F.2d at 363. The original franchise does not cease to exist merely because it has been invalidly assigned. The assignment's invalidity merely means that the *assignment* is ineffective, so that the assignor (rather than the assignee) remains the contracting party. See U.C.C. §2-210 cmt. 3; 6 Am. Jur. 2d *Assignments* §155, at 245 (1999); 6A C.J.S. *Assignments* §119, at 514 (2004); cf. U.C.C. §2-210(2)(a) (delegation "does not relieve the delegating party of any duty to perform"). An invalidly assigned franchise thus remains a "franchise" between the *assignor* and the franchisee under the remainder of the statutory definition, which plainly encom-

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[18] The First Circuit did not rely on that theory below. See J.A. 444-450. The dealers argued the theory only in a footnote, see Pltfs. C.A. Br. 46-47 n.30, and the jury was not instructed on it, see J.A. 372-374. The theory does not even fit the facts of this case: The dealers' burdens increased because Motiva ended the rent subsidy, not because Shell assigned the agreements to Motiva over a year earlier. See pp. 7-14, *supra*.

passes the original franchisor-franchisee contract. See 15 U.S.C. §2801(1)(A), (B)(i)-(ii).[19]

Barnes's theory that "the unexpired portion of a franchise that has been invalidly assigned is no longer a franchise," 795 F.2d at 363, also yields perverse results. The PMPA protects only "franchises" from termination. 15 U.S.C. §2802(a)(1). Thus, if an invalidly assigned franchise were no longer a "franchise," the dealer would lose the *protections* of the Act following an assignment that turned out to be invalid. Once the statute of limitations had run on the invalid assignment, the assignee could terminate the dealer with impunity. Congress surely did not intend that result.

The entire edifice of "constructive termination" law under the PMPA thus rests on a case that plainly makes no sense. Although *Barnes* is often cited, the case's rationale has not become any more persuasive through repetition. This Court should reject the distorted statutory constructions that gave birth to the constructive termination theory, and reject the theory as well.

2. *Even If the PMPA Covered Constructive Terminations, It Would Still Require an End to the Franchise*

Even assuming the PMPA applies to "constructive terminations," such a claim would still require that the dealer lose the franchise. Where Congress borrows from an existing body of law, it is presumed to "'know[] and adopt[] the cluster of ideas that were attached to each borrowed word.'" *Beck* v. *Prupis*, 529 U.S. 494, 500-501 (2000). The court of appeals conceded that, in other con-

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[19] The putative assignor may be in breach because the franchisee is entitled to receive performance from the assignor rather than the assignee. But that is still only a breach, not a "termination."

texts where "constructive terminations" are recognized—such as employment and landlord/tenant law—there must still be an "actual severance of the relationship." J.A. 446. That was the state of the law when Congress enacted the PMPA. And that is the only understanding Congress could have incorporated into the Act (if it allowed constructive termination claims at all).

a. In the employment context, an employee claiming "constructive" discharge "must leave the workplace." J.A. 446. "Under the constructive discharge doctrine, an employee's *reasonable decision to resign* because of unendurable working conditions is assimilated to a formal discharge for remedial purposes." *Pa. State Police* v. *Suders*, 542 U.S. 129, 141 (2004) (emphasis added). "[A] constructive discharge is functionally the same as an actual termination" in that "both 'en[d] the employer-employee relationship.'" *Id.* at 148. Accordingly, "[a]n employee claiming constructive discharge must actually leave employment." 1 B. Lindemann & P. Grossman, *Employment Discrimination Law* 1449 (4th ed. 2007); see also 2 *EEOC Compliance Manual* §612.9(a) (2008); *Rodriguez-Pinto* v. *Tirado-Delgado*, 982 F.2d 34, 37 (1st Cir. 1993); *Pedro-Cos* v. *Contreras*, 976 F.2d 83, 85-86 (1st Cir. 1992); *Mills* v. *Williams*, 276 F. App'x 417, 419 (6th Cir. 2008). A constructive discharge is "constructive" only in the sense that the employee quits because of unbearable conditions rather than being fired—not in the sense that he continues to be employed.

Similarly, a tenant claiming that his landlord's interference with his use of the property amounts to a "constructive" eviction "must move out." J.A. 446. "[I]t is necessary that the tenant relinquish the premises in order that there be a 'constructive eviction,'" as continued occupancy would be both "'logically and legally contra-

dictory.'" 1 H. Tiffany, *The Law of Real Property* § 143, at 233-234 (3d ed. 1939 & Supp. 2008). "[T]here is no constructive eviction where the tenant continues in possession, however much he may be disturbed in the beneficial enjoyment of the premises." 52A C.J.S. *Landlord & Tenant* § 968, at 363 (2003) (footnote omitted).[20]

The state franchise case law that has developed following the PMPA's enactment supports the same requirement. While many courts have refused to allow "constructive termination" claims altogether, see pp. 32-33 & n.15, *supra*, even those that allow them ordinarily require an end to the franchise. Thus, in *Taylor Equipment, Inc.* v. *John Deere Co.*, 98 F.3d 1028 (8th Cir. 1996), the court rejected a claim of "constructive[ ] cancell[ation]" under South Dakota law because the franchisee "continued to be an active * * * dealer"—a status "fundamentally at odds" with its claim. *Id.* at 1035 & n.8. Likewise, in *Remus* v. *Amoco Oil Co.*, 794 F.2d 1238 (7th Cir. 1986), the court explained that a "constructive termination" occurs under Wisconsin law only where a franchisor "mak[es] the dealer's competitive circumstances so desperate that the dealer 'voluntarily' gives up the franchise"—in other words, "drive[s] the dealer out of business." *Id.* at 1240-1241.[21] Many other cases have reached the same conclu-

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[20] See also 49 Am. Jur. 2d *Landlord and Tenant* § 517, at 522 (2006); *Stinson, Lyons, Gerlin & Bustamante, P.A.* v. *Brickell Bldg. 1 Holding Co.*, 923 F.2d 810, 815 (11th Cir. 1991); *Jaffe-Spindler Co.* v. *Genesco, Inc.*, 747 F.2d 253, 256 & n.2 (4th Cir. 1984); *S. Falls Corp.* v. *Kalkstein*, 349 F.2d 378, 385 (5th Cir. 1965); *Liberal Sav. & Loan Co.* v. *Frankel Realty Co.*, 30 N.E.2d 1012, 1017 (Ohio 1940).

[21] Language in the Wisconsin statute arguably extended beyond constructive terminations to conduct with "substantially adverse although not lethal effects," 794 F.2d at 1240-1241, but the PMPA contains no comparable language.

sion.[22] While a handful of contrary cases can be found (decided well after the PMPA's enactment),[23] the weight of authority construing state franchise statutes clearly requires an end to the franchise.

Consequently, to the extent the PMPA permits constructive termination claims, "[t]he accurate analogy * * * would be to a franchisee who shut down its station because the franchisor caused conditions so onerous that the franchisee could not continue in business." *Abrams Shell* v. *Shell Oil Co.*, 216 F. Supp. 2d 634, 641 (S.D. Tex. 2002), aff'd on other grounds, 343 F.3d 482. A plaintiff that continues as a franchisee—using the same trade-

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[22] See *Barney Holland Oil Co.* v. *FleetCor Techs., Inc.*, 275 F. App'x 351, 358-359 (5th Cir. 2008) ("In general, constructive termination requires that the licensee be effectively forced out of business."); *E. Bay Running Store, Inc.* v. *NIKE, Inc.*, 890 F.2d 996, 1000 n.6 (7th Cir. 1989) ("uncontested fact[ ] that plaintiff retains the right to sell Nike Air products" foreclosed constructive termination claim); *Bright Bay GMC Truck, Inc.* v. *Gen. Motors Corp.*, 593 F. Supp. 2d 495, 497 (E.D.N.Y. 2009) (no termination because "Plaintiff continues to operate a GMC franchise"); *Lazar's Auto Sales, Inc.* v. *Chrysler Fin. Corp.*, 83 F. Supp. 2d 384, 389-390 (S.D.N.Y. 2000) (no termination because "dealership is still open for business today"); *Healy* v. *Carlson Travel Network Assocs., Inc.*, 227 F. Supp. 2d 1080, 1090 (D. Minn. 2002) ("de facto termination" occurs "only where the franchisor * * * makes it effectively impossible for the franchisee to do business"); cf. *JPM, Inc.* v. *John Deere Indus. Equip. Co.*, 94 F.3d 270, 271-272 (7th Cir. 1996) ("assum[ing]" viability of constructive termination claim where franchisor coerces dealer to sell its business); *Am. Bus. Interiors, Inc.* v. *Haworth, Inc.*, 798 F.2d 1135, 1141 (8th Cir. 1986) (allowing claim where franchisor refused to do business with franchisee); *In re Kirkwood Kin Corp.* v. *Dunkin' Donuts, Inc.*, No. 94C-03-189, 1997 WL 529587, at *9 (Del. Super. Jan. 29, 1997); *Meyer* v. *Kero-Sun, Inc.*, 570 F. Supp. 402, 406-407 (W.D. Wis. 1983); ABA Section of Antitrust Law, *supra*, at 17-20.

[23] See, *e.g.*, *Petereit* v. *S.B. Thomas, Inc.*, 63 F.3d 1169, 1181-1183 (2d Cir. 1995) (Connecticut law).

mark, receiving the same fuel, and occupying the same premises—has not been "terminated" in any sense.

"Constructive termination" claims, moreover, cannot become a license for suit every time a dealer finds its franchise uneconomical. If the Court were to create such a cause of action, the Court would also have to articulate its boundaries carefully. To prevail on a "constructive termination" claim, for example, a plaintiff would have to show that the franchisor's conduct was so severe that a *reasonable franchisee* would have been *compelled* to abandon its franchise.[24] A plaintiff would also have to show that it was forced to end its franchise because the franchisor acted *wrongfully* with respect to the regulated relationship—*i.e.*, that the franchisor violated one of the three statutory elements of the franchise agreement.[25]

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[24] As this Court explained in the constructive discharge context, "[t]he inquiry is objective: Did working conditions become so intolerable that a *reasonable person* in the employee's position would have felt *compelled* to resign?" *Suders*, 542 U.S. at 141 (emphasis added); see also 1 Lindemann & Grossman, *supra*, at 1438-1441 & n.71. A franchisee thus could not recover if it failed because of its own pre-existing marginality.

[25] For constructive eviction claims, "it is essential that the tenant's quiet enjoyment be disturbed by some *wrongdoing* on the part of the landlord, and a constructive eviction does not arise from an attempt by the landlord to hold the tenant to the terms of the lease." 52A C.J.S. *Landlord & Tenant* § 966, at 362 (2003) (footnote omitted) (emphasis added). Likewise, "[a] constructive discharge occurs when an employee resigns from his/her employment because (s)he is being subjected to *unlawful employment practices*." 2 *EEOC Compliance Manual* § 612.9(a) (2008) (emphasis added). A franchisee thus could not claim constructive termination under the PMPA unless the franchisor's conduct was wrongful and related to the elements making up the franchise—*i.e.*, the franchisor breached one of the three statutory elements. See J.A. 444-445; *Dersch*, 314 F.3d at 859; *Portland 76*, 153 F.3d at 948; *Clark*, 137 F.3d at 390-392; *May-Som*, 869 F.2d at 922.

The very fact that the Court would have to extrapolate so many elements of a "constructive termination" claim with no guidance from Congress is reason enough to reject the theory. Cf. *Cent. Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 188-189 (1994). At the very least, however, "termination" is a *sine qua non* of any claim for "constructive termination."

b. The court of appeals admitted that constructive terminations in other contexts—employment and landlord-tenant—require "an actual severance of the relationship." J.A. 446. But it refused to apply that principle here. Opining that "sunk costs, optimism, and the habit of years might lead franchisees to try to make the new arrangements work, even when the terms have changed so materially as to make success impossible," the court asserted that "requir[ing] an actual abandonment of years of work and investment before we recognize a right of action under the PMPA would be unreasonable." *Id.* at 446-447.

That rationale ignores state-law remedies. While the PMPA addresses only terminations, "[s]tate laws dealing with [other] aspects of the relationship are not preempted." S. Rep. No. 95-731, at 42. Here, for example, the dealers recovered $1.3 million on breach-of-contract claims that were based on the same facts as their constructive termination claims. See p. 28, *supra*. The dealers were thus hardly required to "abandon[ ] * * * years of work and investment" to obtain meaningful relief. Besides, "sunk costs, optimism, and the habit of years" surely lead many longtime employees or tenants to "try to make the new arrangements work" as well. The First Circuit never explained why the law should require an impoverished immigrant to "move out" before claiming "constructive eviction," or a dedicated employee to "leave

the workplace" before claiming "constructive discharge," but not require the operator of a chain of service stations to stop operating one of its stations before suing for "constructive termination."

Barnes insisted that "[o]ne of Congress's purposes in adopting the [PMPA] was to protect franchisees from overbearing, burdensome conduct by the franchisor during the term of the franchise." 795 F.2d at 362-363 (citing S. Rep. No. 95-731, at 17-19). But Congress enacted the PMPA to address terminations and non-renewals, not "burdensome conduct." Even the legislative history that *Barnes* cites makes that clear. See S. Rep. No. 95-731, at 17-19. Besides, whatever Congress's purposes, it chose to advance them by restricting only terminations and non-renewals. "[N]o legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice—and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law." *Rodriguez* v. *United States*, 480 U.S. 522, 525-526 (1987).

C. The Evidence Failed To Show That Any of the Eight Dealers Was "Terminated" in This Case

Because the court of appeals applied the wrong standard, its judgment on the termination claims should be reversed. A "termination" of any sort requires an end to the franchise. Here, "no actual termination occurred." J.A. 432. At no time did Shell or Motiva inform the dealers that their franchises were being put to an end. Nor did Shell or Motiva refuse to provide any of the statutory elements of the franchise (by denying a dealer use of the premises, cutting off fuel supply, or rescinding trademark rights).

Four dealers, moreover, were still operating their Shell stations at the time of trial, almost *five years* after the elimination of the rent subsidy that allegedly "terminated" their franchises. See p. 10, *supra*. It is absurd to permit a claim for "termination" where a dealer is still a franchisee five years later, using the same premises, motor fuel, and trademark (and earning as much as $200,000 a year doing so). See p. 14, *supra*. Three other dealers continued to operate for months or years through the end of their stated franchise terms; they then signed new Motiva agreements and operated under those too. See p. 11 & n.8, *supra*. Those three dealers likewise cannot establish that their franchises were "terminate[d] * * * prior to the conclusion of the[ir] term," as the PMPA requires. 15 U.S.C. § 2802(a)(1).[26]

Only one dealer—Pisarczyk—left the service-station business before his franchise expired. But Pisarczyk had been planning to convert the station to a garden center before the subsidy ended and never claimed that his decision to leave the service-station business had anything to do with Motiva's rent policies. See p. 11, *supra*. In his case too, therefore, the complained-of conduct did not "terminate" his franchise in any sense. The judgment must accordingly be reversed.

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[26] Whether a dealer ceases operations *after* the relevant franchise agreement expires is irrelevant. The PMPA applies only to termination of the "franchise"—*i.e.*, the franchise "contract"—"prior to the conclusion of [its] term." 15 U.S.C. §§ 2801(1), 2802(a)(1). Here, seven dealers continued operating for the full terms of the agreements that were purportedly "terminated" by elimination of the rent subsidy. The subsequent Motiva agreements did not include that subsidy and thus could not have been constructively terminated by its elimination. Indeed, the dealers *disavowed* any claim for constructive termination based on the subsequent Motiva agreements. See Pltfs. C.A. Br. 40 n.29.

II. A Dealer That Signs A Renewal Agreement Cannot Claim That The Franchisor "Failed To Renew" The Franchise Relationship (No. 08-240)

Despite having allowed the dealers' "constructive termination" claims, the court of appeals rejected their parallel "constructive non-renewal" claims. That latter decision was correct. The dealers were offered and accepted renewal agreements. Motiva thus did not "fail to renew" the franchise relationships in violation of the PMPA.

A. The PMPA Does Not Permit Non-Renewal Claims Where the Franchise Relationship Is Renewed

1. In addition to addressing "terminat[ion]" during a franchise's stated term, the PMPA also addresses "fail-[ure] to renew" at the end of the term. 15 U.S.C. §2802(a). "[N]o franchisor," the Act provides, may "fail to renew any franchise relationship" except on specified grounds following prescribed notice. *Id.* §2802(a)(2). The dealer has the burden of showing "nonrenewal of the franchise relationship." *Id.* §2805(c). The Act defines "fail to renew" and "nonrenewal" as "a failure to reinstate, continue, or extend the franchise relationship * * * at the conclusion of the term, or on the expiration date, stated in the relevant franchise." *Id.* §2801(14)(A).

Those terms are unambiguous. A "failure" to do something is an "[o]mission to perform * * * an appointed function." *Webster's*, *supra*, at 910. Thus, where the franchisor actually offers a renewal agreement and the franchisee executes that agreement, the franchisor has not "fail[ed] to renew" the franchise relationship. The franchisor has not "[o]mi[tted]" to "reinstate, continue, or extend." To the contrary, because the parties execute a renewal agreement, the relationship has been extended.

Dealers may complain that a new agreement contains terms different from those in the old one. But Congress proscribed only non-renewals—not renewals on terms the dealer dislikes but nonetheless accepts. Congress "recognize[d] the importance of providing adequate flexibility so that franchisors may initiate changes in their marketing activities to respond to changing market conditions and consumer preferences." S. Rep. No. 95-731, at 19. For that reason, the Act expressly permits "changes or additions to the provisions of the franchise" at the time of renewal, and authorizes non-renewal if a dealer "fail[s] * * * to agree." 15 U.S.C. §2802(b)(3)(A). Congress, moreover, used the broader term "franchise relationship" (rather than "franchise") in the non-renewal context to make clear that franchisors do not have to keep offering the same "franchise" (*i.e.*, the same franchise agreement) each time an agreement expires. See S. Rep. No. 95-731, at 30 (discussing 15 U.S.C. §2801(1)-(2)).

The Act does prohibit "nonrenewal" where the new terms are not proposed "in good faith and in the normal course of business" or are proposed "for the purpose of converting the leased marketing premises to operation by employees or agents of the franchisor * * * or otherwise preventing the renewal of the franchise relationship." 15 U.S.C. §2802(b)(3)(A). But those prohibitions by their terms identify circumstances where *refusing to renew* a dealer is unlawful. See *ibid.* They do not provide an independent basis for suit where the franchisor *in fact renews* the dealer. The Act provides a cause of action only for "fail[ure] to renew." *Id.* §§2802(a)(2), 2805(a). Bad motives can transform an otherwise permissible non-renewal into an unjustified one. But they cannot transform a renewal into a non-renewal where the

parties actually execute a renewal agreement extending the relationship.

The courts of appeals have thus overwhelmingly rejected claims for "non-renewal" by dealers that sign renewal agreements. In *Dersch*, the Seventh Circuit refused to permit a claim by a dealer that signed a renewal agreement "under protest." 314 F.3d at 849-851. "[T]he PMPA," the court noted, "was enacted to address one narrow, yet crucial, aspect of petroleum franchise relationships—the termination of franchises and the nonrenewal of franchise relationships." *Id.* at 859. "[B]y signing the renewal agreement, and thus renewing its statutory 'franchise,' [the dealer] divested itself of the right to bring an action under the PMPA." *Id.* at 866. Three other courts of appeals have agreed. See J.A. 450-454; *Abrams Shell*, 343 F.3d at 488-489 & n.16; *Clark*, 137 F.3d at 394-395. Only the Ninth Circuit has held otherwise, see *Pro Sales, Inc.* v. *Texaco, U.S.A.*, 792 F.2d 1394, 1398-1399 (9th Cir. 1986), and its decision has been "rejected by the other circuits," J.A. 451.

2. Recognizing a cause of action for non-renewal where a dealer accepts a renewal agreement would also flout the Act's carefully calibrated notice-and-preliminary-relief framework for resolving renewal disputes. Where a franchisor and a dealer are unable to agree on renewal terms, the franchisor can refuse to renew the dealer. 15 U.S.C. §2802(b)(3)(A). But the franchisor must provide notice of non-renewal "not less than 90 days prior to the date on which such * * * nonrenewal takes effect." *Id.* §2804(a)(2). Once the dealer receives notice, it can invoke the Act's private cause of action and demand a preliminary injunction maintaining the status quo while a court determines the lawfulness of the proposed terms. *Id.* §2805(a), (b)(2). The Act thus creates a com-

prehensive mechanism that (1) requires franchisors to notify dealers of their intent not to renew well in advance; and (2) provides aggrieved franchisees a 90-day period in which to seek relief before the non-renewal takes effect.

As this Court has explained, "[t]he express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others." *Alexander* v. *Sandoval*, 532 U.S. 275, 290 (2001); see also *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11, 19-20 (1979). That canon has particular force where, as here, Congress enacts a "'precisely drawn, detailed statute.'" *EC Term of Years Trust* v. *United States*, 550 U.S. 429, 433 (2007). By creating an elaborate notice-and-preliminary-relief mechanism to govern renewal disputes under the PMPA, "Congress clearly indicated the means by which it would protect franchisees." *Dersch*, 314 F.3d at 865.

That comprehensive notice-and-preliminary-injunction structure would be frustrated if franchisees could simply sign objectionable renewal agreements, continue to operate under them, and then sue for damages under a "constructive non-renewal" theory. Congress specifically authorized franchisors to propose new or different terms in renewal agreements, subject only to limited exceptions. 15 U.S.C. §2802(b)(3)(A). It did so because it "recognize[d] the importance of providing adequate flexibility * * * to respond to changing market conditions and consumer preferences." S. Rep. No. 95-731, at 19. Allowing "non-renewal" claims by franchisees who actually sign renewal agreements converts the exercise of that intended flexibility into a perilous venture. Any time franchisors proposed new terms, dealers could sign the new agreements and reap the benefits thereof while speculat-

ing on potential damages claims. And franchisors could confront liability for non-renewal in a suit filed well into the term of the franchise, even though both parties agreed to the contract.

B. The Rationales for Recognizing Constructive Non-Renewal Claims Lack Merit

That same notice-and-preliminary-relief structure also refutes the Ninth Circuit's rationale for allowing non-renewal claims by dealers that sign renewal agreements. *Pro Sales* rested its ruling on legislative history that mentioned "*threats* of nonrenewal as well as nonrenewals themselves." 792 F.2d at 1399 (citing S. Rep. No. 95-731, at 18). Congress, however, fully addressed any concerns about "threatened" non-renewals by requiring franchisors to provide 90 days' notice of any non-renewal. See 15 U.S.C. §2804(a). As the Seventh Circuit recognized, "'[b]ecause a franchisor cannot [fail to renew] without providing the requisite notice, threats of [non-renewal] unaccompanied by explicit notice pursuant to §2804 have no teeth.'" *Dersch*, 314 F.3d at 863. Once the franchisor issues the notice, the dealer has ample time to seek preliminary relief. Given that explicit structure, constructive non-renewal claims are not necessary to redress "threatened" non-renewals.

Nor is there any merit to the Ninth Circuit's suggestion that, absent constructive non-renewal claims, dealers would be forced to "go out of business before invoking the protections of the PMPA." *Pro Sales*, 792 F.2d at 1399. That contention "completely disregards the statutory protection afforded to franchisees" by the notice-and-preliminary-relief framework. *Dersch*, 314 F.3d at 865. Franchisees that receive a notice of non-renewal following a dispute over renewal terms can challenge the terms in court *before* the non-renewal takes effect. And

because the Act substantially relaxes the standard for injunctive relief, see 15 U.S.C. §2805(b)(2), dealers with anything approaching a meritorious claim can obtain an injunction maintaining the status quo as a matter of course. See *Dersch*, 314 F.3d at 865.

Finally, plaintiffs have argued that they may pursue a "constructive non-renewal" claim because they signed the renewal agreements "under protest" and thereby "reserve[d] [their] right[ ]" to sue. Pet. in No. 08-240, at 24-26. There are circumstances where acting "under protest" can avoid a waiver of rights—for example, paying an unlawful tax or accepting defective performance on a contract. See, *e.g.*, U.C.C. §1-207(1). But that principle is beside the point here. Plaintiffs did not have a valid claim under the PMPA that they waived by renewing their agreements. The PMPA simply provides no claim at all except in the two contexts Congress addressed—termination and non-renewal. Absent a non-renewal, a dealer simply has no "right" to sue under the PMPA at all. See 15 U.S.C. §§2802(a)(2), 2805(a). Where a "right" never comes into existence, there is nothing to "reserve" by signing under protest.

C. Motiva Did Not "Fail To Renew" Any of the Eight Dealers

As the court of appeals recognized, J.A. 450-454, the statute, properly construed, forecloses the non-renewal claims of all eight dealers in this case. Seven of the dealers were presented with renewal agreements based on the new rent formula that, in their view, amounted to a "constructive non-renewal" of their franchise relationships. The dealers signed those renewal agreements. See p. 11 & nn.7-8, *supra*. Because those dealers' franchise relationships were renewed, Motiva could not have "failed to renew" them in violation of the PMPA. The

eighth dealer, Pisarczyk, left the service-station business for unrelated reasons five months before his franchise agreement expired, leaving no occasion for renewal. See p. 11, *supra*. The court of appeals thus properly reversed.

CONCLUSION

The judgment of the court of appeals should be reversed with respect to the termination claims (No. 08-372) and affirmed with respect to the non-renewal claims (No. 08-240).

Respectfully submitted.

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AUGUST 2009

APPENDIX

APPENDIX
RELEVANT STATUTORY PROVISIONS

Title I of the Petroleum Marketing Practices Act, Pub. L. No. 95-297, 92 Stat. 322, 322 (1978), as amended in 1994 and 2007 and codified at 15 U.S.C. §§2801-2807, provides as follows:

§ 2801. Definitions

As used in this subchapter:

(1)(A) The term "franchise" means any contract—

(i) between a refiner and a distributor,

(ii) between a refiner and a retailer,

(iii) between a distributor and another distributor, or

(iv) between a distributor and a retailer,

under which a refiner or distributor (as the case may be) authorizes or permits a retailer or distributor to use, in connection with the sale, consignment, or distribution of motor fuel, a trademark which is owned or controlled by such refiner or by a refiner which supplies motor fuel to the distributor which authorizes or permits such use.

(B) The term "franchise" includes—

(i) any contract under which a retailer or distributor (as the case may be) is authorized or permitted to occupy leased marketing premises, which premises are to be employed in connection with the sale, consignment, or distribution of motor fuel under a trademark which is owned or controlled by such refiner or by a refiner which supplies motor fuel to the distributor which authorizes or permits such occupancy;

(ii) any contract pertaining to the supply of motor fuel which is to be sold, consigned or distributed—

(I) under a trademark owned or controlled by a refiner; or

(II) under a contract which has existed continuously since May 15, 1973, and pursuant to which, on May 15, 1973, motor fuel was sold, consigned or distributed under a trademark owned or controlled on such date by a refiner; and

(iii) the unexpired portion of any franchise, as defined by the preceding provisions of this paragraph, which is transferred or assigned as authorized by the provisions of such franchise or by any applicable provision of State law which permits such transfer or assignment without regard to any provision of the franchise.

(2) The term "franchise relationship" means the respective motor fuel marketing or distribution obligations and responsibilities of a franchisor and a franchisee which result from the marketing of motor fuel under a franchise.

(3) The term "franchisor" means a refiner or distributor (as the case may be) who authorizes or permits, under a franchise, a retailer or distributor to use a trademark in connection with the sale, consignment, or distribution of motor fuel.

(4) The term "franchisee" means a retailer or distributor (as the case may be) who is authorized or permitted, under a franchise, to use a trademark in connection with the sale, consignment, or distribution of motor fuel.

(5) The term "refiner" means any person engaged in the refining of crude oil to produce motor fuel, and includes any affiliate of such person.

(6) The term "distributor" means any person, including any affiliate of such person, who—

(A) purchases motor fuel for sale, consignment, or distribution to another; or

(B) receives motor fuel on consignment for consignment or distribution to his own motor fuel accounts or to accounts of his supplier, but shall not include a person who is an employee of, or merely serves as a common carrier providing transportation service for, such supplier.

(7) The term "retailer" means any person who purchases motor fuel for sale to the general public for ultimate consumption.

(8) The term "marketing premises" means, in the case of any franchise, premises which, under such franchise, are to be employed by the franchisee in connection with sale, consignment, or distribution of motor fuel.

(9) The term "leased marketing premises" means marketing premises owned, leased, or in any way controlled by a franchisor and which the franchisee is authorized or permitted, under the franchise, to employ in connection with the sale, consignment, or distribution of motor fuel.

(10) The term "contract" means any oral or written agreement. For supply purposes, delivery levels during the same month of the previous year shall be prima facie evidence of an agreement to deliver such levels.

(11) The term "trademark" means any trademark, trade name, service mark, or other identifying symbol or name.

(12) The term "motor fuel" means gasoline and diesel fuel of a type distributed for use as a fuel in self-propelled vehicles designed primarily for use on public streets, roads, and highways.

(13) The term "failure" does not include—

(A) any failure which is only technical or unimportant to the franchise relationship;

(B) any failure for a cause beyond the reasonable control of the franchisee; or

(C) any failure based on a provision of the franchise which is illegal or unenforceable under the law of any State (or subdivision thereof).

(14) The terms "fail to renew" and "nonrenewal" mean, with respect to any franchise relationship, a failure to reinstate, continue, or extend the franchise relationship—

(A) at the conclusion of the term, or on the expiration date, stated in the relevant franchise;

(B) at any time, in the case of the relevant franchise which does not state a term of duration or an expiration date; or

(C) following a termination (on or after June 19, 1978) of the relevant franchise which was entered into prior to June 19, 1978, and has not been renewed after such date.

(15) The term "affiliate" means any person who (other than by means of a franchise) controls, is controlled by, or is under common control with, any other person.

(16) The term "relevant geographic market area" includes a State or a standard metropolitan statistical area as periodically established by the Office of Management and Budget.

(17) The term "termination" includes cancellation.

(18) The term "commerce" means any trade, traffic, transportation, exchange, or other commerce—

(A) between any State and any place outside of such State; or

(B) which affects any trade, transportation, exchange, or other commerce described in subparagraph (A).

(19) The term "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, American Samoa, Guam, and any other commonwealth, territory, or possession of the United States.

§ 2802. Franchise relationship

(a) General prohibition against termination or nonrenewal

Except as provided in subsection (b) of this section and section 2803 of this title, no franchisor engaged in the sale, consignment, or distribution of motor fuel in commerce may—

(1) terminate any franchise (entered into or renewed on or after June 19, 1978) prior to the conclusion of the term, or the expiration date, stated in the franchise; or

(2) fail to renew any franchise relationship (without regard to the date on which the relevant franchise was entered into or renewed).

(b) Precondition and grounds for termination or nonrenewal

(1) Any franchisor may terminate any franchise (entered into or renewed on or after June 19, 1978) or may fail to renew any franchise relationship, if—

(A) the notification requirements of section 2804 of this title are met; and

(B) such termination is based upon a ground described in paragraph (2) or such nonrenewal is based upon a ground described in paragraph (2) or (3).

(2) For purposes of this subsection, the following are grounds for termination of a franchise or nonrenewal of a franchise relationship:

(A) A failure by the franchisee to comply with any provision of the franchise, which provision is both reasonable and of material significance to the franchise relationship, if the franchisor first acquired actual or constructive knowledge of such failure—

(i) not more than 120 days prior to the date on which notification of termination or nonrenewal is given, if notification is given pursuant to section 2804(a) of this title; or

(ii) not more than 60 days prior to the date on which notification of termination or nonrenewal is given, if less than 90 days notification is given pursuant to section 2804(b)(1) of this title.

(B) A failure by the franchisee to exert good faith efforts to carry out the provisions of the franchise, if—

(i) the franchisee was apprised by the franchisor in writing of such failure and was afforded a reasonable opportunity to exert good faith efforts to carry out such provisions; and

(ii) such failure thereafter continued within the period which began not more than 180 days before the date notification of termination or nonrenewal was given pursuant to section 2804 of this title.

(C) The occurrence of an event which is relevant to the franchise relationship and as a result of which

termination of the franchise or nonrenewal of the franchise relationship is reasonable, if such event occurs during the period the franchise is in effect and the franchisor first acquired actual or constructive knowledge of such occurrence—

(i) not more than 120 days prior to the date on which notification of termination or nonrenewal is given, if notification is given pursuant to section 2804(a) of this title; or

(ii) not more than 60 days prior to the date on which notification of termination or nonrenewal is given, if less than 90 days notification is given pursuant to section 2804(b)(1) of this title.

(D) An agreement, in writing, between the franchisor and the franchisee to terminate the franchise or not to renew the franchise relationship, if—

(i) such agreement is entered into not more than 180 days prior to the date of such termination or, in the case of nonrenewal, not more than 180 days prior to the conclusion of the term, or the expiration date, stated in the franchise;

(ii) the franchisee is promptly provided with a copy of such agreement, together with the summary statement described in section 2804(d) of this title; and

(iii) within 7 days after the date on which the franchisee is provided a copy of such agreement, the franchisee has not posted by certified mail a written notice to the franchisor repudiating such agreement.

(E) In the case of any franchise entered into prior to June 19, 1978, and in the case of any franchise entered into or renewed on or after such date (the term

of which is 3 years or longer, or with respect to which the franchisee was offered a term of 3 years or longer), a determination made by the franchisor in good faith and in the normal course of business to withdraw from the marketing of motor fuel through retail outlets in the relevant geographic market area in which the marketing premises are located, if—

(i) such determination—

(I) was made after the date such franchise was entered into or renewed, and

(II) was based upon the occurrence of changes in relevant facts and circumstances after such date;

(ii) the termination or nonrenewal is not for the purpose of converting the premises, which are the subject of the franchise, to operation by employees or agents of the franchisor for such franchisor's own account; and

(iii) in the case of leased marketing premises—

(I) the franchisor, during the 180-day period after notification was given pursuant to section 2804 of this title, either made a bona fide offer to sell, transfer, or assign to the franchisee such franchisor's interests in such premises, or, if applicable, offered the franchisee a right of first refusal of at least 45 days duration of an offer, made by another, to purchase such franchisor's interest in such premises; or

(II) in the case of the sale, transfer, or assignment to another person of the franchisor's interest in such premises in connection with the sale, transfer, or assignment to such other

person of the franchisor's interest in one or more other marketing premises, if such other person offers, in good faith, a franchise to the franchisee on terms and conditions which are not discriminatory to the franchisee as compared to franchises then currently being offered by such other person or franchises then in effect and with respect to which such other person is the franchisor.

(3) For purposes of this subsection, the following are grounds for nonrenewal of a franchise relationship:

(A) The failure of the franchisor and the franchisee to agree to changes or additions to the provisions of the franchise, if—

(i) such changes or additions are the result of determinations made by the franchisor in good faith and in the normal course of business; and

(ii) such failure is not the result of the franchisor's insistence upon such changes or additions for the purpose of converting the leased marketing premises to operation by employees or agents of the franchisor for the benefit of the franchisor or otherwise preventing the renewal of the franchise relationship.

(B) The receipt of numerous bona fide customer complaints by the franchisor concerning the franchisee's operation of the marketing premises, if—

(i) the franchisee was promptly apprised of the existence and nature of such complaints following receipt of such complaints by the franchisor; and

(ii) if such complaints related to the condition of such premises or to the conduct of any em-

ployee of such franchisee, the franchisee did not promptly take action to cure or correct the basis of such complaints.

(C) A failure by the franchisee to operate the marketing premises in a clean, safe, and healthful manner, if the franchisee failed to do so on two or more previous occasions and the franchisor notified the franchisee of such failures.

(D) In the case of any franchise entered into prior to June 19, 1978, (the unexpired term of which, on such date, is 3 years or longer) and, in the case of any franchise entered into or renewed on or after such date (the term of which was 3 years or longer, or with respect to which the franchisee was offered a term of 3 years or longer), a determination made by the franchisor in good faith and in the normal course of business, if—

(i) such determination is—

(I) to convert the leased marketing premises to a use other than the sale or distribution of motor fuel,

(II) to materially alter, add to, or replace such premises,

(III) to sell such premises, or

(IV) that renewal of the franchise relationship is likely to be uneconomical to the franchisor despite any reasonable changes or reasonable additions to the provisions of the franchise which may be acceptable to the franchisee;

(ii) with respect to a determination referred to in subclause (II) or (IV), such determination is not made for the purpose of converting the leased marketing premises to operation by employees or

agents of the franchisor for such franchisor's own account; and

(iii) in the case of leased marketing premises such franchisor, during the 90-day period after notification was given pursuant to section 2804 of this title, either—

(I) made a bona fide offer to sell, transfer, or assign to the franchisee such franchisor's interests in such premises; or

(II) if applicable, offered the franchisee a right of first refusal of at least 45-days duration of an offer, made by another, to purchase such franchisor's interest in such premises.

(c) Definition

As used in subsection (b)(2)(C) of this section, the term "an event which is relevant to the franchise relationship and as a result of which termination of the franchise or nonrenewal of the franchise relationship is reasonable" includes events such as—

(1) fraud or criminal misconduct by the franchisee relevant to the operation of the marketing premises;

(2) declaration of bankruptcy or judicial determination of insolvency of the franchisee;

(3) continuing severe physical or mental disability of the franchisee of at least 3 months duration which renders the franchisee unable to provide for the continued proper operation of the marketing premises;

(4) loss of the franchisor's right to grant possession of the leased marketing premises through expiration of an underlying lease, if—

(A) the franchisee was notified in writing, prior to the commencement of the term of the then existing franchise—

(i) of the duration of the underlying lease; and

(ii) of the fact that such underlying lease might expire and not be renewed during the term of such franchise (in the case of termination) or at the end of such term (in the case of nonrenewal);

(B) during the 90-day period after notification was given pursuant to section 2804 of this title, the franchisor offers to assign to the franchisee any option to extend the underlying lease or option to purchase the marketing premises that is held by the franchisor, except that the franchisor may condition the assignment upon receipt by the franchisor of—

(i) an unconditional release executed by both the landowner and the franchisee releasing the franchisor from any and all liability accruing after the date of the assignment for—

(I) financial obligations under the option (or the resulting extended lease or purchase agreement);

(II) environmental contamination to (or originating from) the marketing premises; or

(III) the operation or condition of the marketing premises; and

(ii) an instrument executed by both the landowner and the franchisee that ensures the franchisor and the contractors of the franchisor reasonable access to the marketing premises for the purpose of testing for and remediating any environmental contamination that may be present at the premises; and

(C) in a situation in which the franchisee acquires possession of the leased marketing premises effective immediately after the loss of the right of the franchisor to grant possession (through an assignment pursuant to subparagraph (B) or by obtaining a new lease or purchasing the marketing premises from the landowner), the franchisor (if requested in writing by the franchisee not later than 30 days after notification was given pursuant to section 2804 of this title), during the 90-day period after notification was given pursuant to section 2804 of this title—

(i) made a bona fide offer to sell, transfer, or assign to the franchisee the interest of the franchisor in any improvements or equipment located on the premises; or

(ii) if applicable, offered the franchisee a right of first refusal (for at least 45 days) of an offer, made by another person, to purchase the interest of the franchisor in the improvements and equipment.

(5) condemnation or other taking, in whole or in part, of the marketing premises pursuant to the power of eminent domain;

(6) loss of the franchisor's right to grant the right to use the trademark which is the subject of the franchise, unless such loss was due to trademark abuse, violation of Federal or State law, or other fault or negligence of the franchisor, which such abuse, violation, or other fault or negligence is related to action taken in bad faith by the franchisor;

(7) destruction (other than by the franchisor) of all or a substantial part of the marketing premises;

(8) failure by the franchisee to pay to the franchisor in a timely manner when due all sums to which the franchisor is legally entitled;

(9) failure by the franchisee to operate the marketing premises for—

(A) 7 consecutive days, or

(B) such lesser period which under the facts and circumstances constitutes an unreasonable period of time;

(10) willful adulteration, mislabeling or misbranding of motor fuels or other trademark violations by the franchisee;

(11) knowing failure of the franchisee to comply with Federal, State, or local laws or regulations relevant to the operation of the marketing premises; and

(12) conviction of the franchisee of any felony involving moral turpitude.

(d) Compensation, etc., for franchisee upon condemnation or destruction of marketing premises

In the case of any termination of a franchise (entered into or renewed on or after June 19, 1978), or in the case of any nonrenewal of a franchise relationship (without regard to the date on which such franchise relationship was entered into or renewed)—

(1) if such termination or nonrenewal is based upon an event described in subsection (c)(5) of this section, the franchisor shall fairly apportion between the franchisor and the franchisee compensation, if any, received by the franchisor based upon any loss of business opportunity or good will; and

(2) if such termination or nonrenewal is based upon an event described in subsection (c)(7) of this

section and the leased marketing premises are subsequently rebuilt or replaced by the franchisor and operated under a franchise, the franchisor shall, within a reasonable period of time, grant to the franchisee a right of first refusal of the franchise under which such premises are to be operated.

§ 2803. Trial and interim franchises

(a) Nonapplicability of statutory nonrenewal provisions

The provisions of section 2802 of this title shall not apply to the nonrenewal of any franchise relationship—

(1) under a trial franchise; or

(2) under an interim franchise.

(b) Definitions

For purposes of this section—

(1) The term "trial franchise" means any franchise—

(A) which is entered into on or after June 19, 1978;

(B) the franchisee of which has not previously been a party to a franchise with the franchisor;

(C) the initial term of which is for a period of not more than 1 year; and

(D) which is in writing and states clearly and conspicuously—

(i) that the franchise is a trial franchise;

(ii) the duration of the initial term of the franchise;

(iii) that the franchisor may fail to renew the franchise relationship at the conclusion of

the initial term stated in the franchise by notifying the franchisee, in accordance with the provisions of section 2804 of this title, of the franchisor's intention not to renew the franchise relationship; and

(iv) that the provisions of section 2802 of this title, limiting the right of a franchisor to fail to renew a franchise relationship, are not applicable to such trial franchise.

(2) The term "trial franchise" does not include any unexpired period of any term of any franchise (other than a trial franchise, as defined by paragraph (1)) which was transferred or assigned by a franchisee to the extent authorized by the provisions of the franchise or any applicable provision of State law which permits such transfer or assignment, without regard to any provision of the franchise.

(3) The term "interim franchise" means any franchise—

(A) which is entered into on or after June 19, 1978;

(B) the term of which, when combined with the terms of all prior interim franchises between the franchisor and the franchisee, does not exceed 3 years;

(C) the effective date of which occurs immediately after the expiration of a prior franchise, applicable to the marketing premises, which was not renewed if such nonrenewal—

(i) was based upon a determination described in section 2802(b)(2)(E) of this title, and

(ii) the requirements of section 2802(b)(2)(E) of this title were satisfied; and

(D) which is in writing and states clearly and conspicuously—

(i) that the franchise is an interim franchise;

(ii) the duration of the franchise; and

(iii) that the franchisor may fail to renew the franchise at the conclusion of the term stated in the franchise based upon a determination made by the franchisor in good faith and in the normal course of business to withdraw from the marketing of motor fuel through retail outlets in the relevant geographic market area in which the marketing premises are located if the requirements of section 2802(b)(2)(E)(ii) and (iii) of this title are satisfied.

(c) Nonrenewal upon meeting statutory notification requirements

If the notification requirements of section 2804 of this title are met, any franchisor may fail to renew any franchise relationship—

(1) under any trial franchise, at the conclusion of the initial term of such trial franchise; and

(2) under any interim franchise, at the conclusion of the term of such interim franchise, if—

(A) such nonrenewal is based upon a determination described in section 2802(b)(2)(E) of this title; and

(B) the requirements of section 2802(b)(2)(E)(ii) and (iii) of this title are satisfied.

§ 2804. Notification of termination or nonrenewal of franchise relationship

(a) General requirements applicable to franchisor

Prior to termination of any franchise or nonrenewal of any franchise relationship, the franchisor shall furnish notification of such termination or such nonrenewal to the franchisee who is a party to such franchise or such franchise relationship—

(1) in the manner described in subsection (c) of this section; and

(2) except as provided in subsection (b) of this section, not less than 90 days prior to the date on which such termination or nonrenewal takes effect.

(b) Additional requirements applicable to franchisor

(1) In circumstances in which it would not be reasonable for the franchisor to furnish notification, not less than 90 days prior to the date on which termination or nonrenewal takes effect, as required by subsection (a)(2) of this section—

(A) such franchisor shall furnish notification to the franchisee affected thereby on the earliest date on which furnishing of such notification is reasonably practicable; and

(B) in the case of leased marketing premises, such franchisor—

(i) may not establish a new franchise relationship with respect to such premises before the expiration of the 30-day period which begins—

(I) on the date notification was posted or personally delivered, or

(II) if later, on the date on which such termination or nonrenewal takes effect; and

(ii) may, if permitted to do so by the franchise agreement, repossess such premises and, in circumstances under which it would be reasonable to do so, operate such premises through employees or agents.

(2) In the case of any termination of any franchise or any nonrenewal of any franchise relationship pursuant to the provisions of section 2802(b)(2)(E) of this title or section 2803(c)(2) of this title, the franchisor shall—

(A) furnish notification to the franchisee not less than 180 days prior to the date on which such termination or nonrenewal takes effect; and

(B) promptly provide a copy of such notification, together with a plan describing the schedule and conditions under which the franchisor will withdraw from the marketing of motor fuel through retail outlets in the relevant geographic area, to the Governor of each State which contains a portion of such area.

(c) Manner and form of notification

Notification under this section—

(1) shall be in writing;

(2) shall be posted by certified mail or personally delivered to the franchisee; and

(3) shall contain—

(A) a statement of intention to terminate the franchise or not to renew the franchise relationship, together with the reasons therefor;

(B) the date on which such termination or nonrenewal takes effect; and

(C) the summary statement prepared under subsection (d) of this section.

(d) Preparation, publication, etc., of statutory summaries

(1) Not later than 30 days after June 19, 1978, the Secretary of Energy shall prepare and publish in the Federal Register a simple and concise summary of the provisions of this subchapter, including a statement of the respective responsibilities of, and the remedies and relief available to, any franchisor and franchisee under this subchapter.

(2) In the case of summaries required to be furnished under the provisions of section 2802(b)(2)(D) of this title or subsection (c)(3)(C) of this section before the date of publication of such summary in the Federal Register, such summary may be furnished not later than 5 days after it is so published rather than at the time required under such provisions.

§ 2805. Enforcement provisions

(a) Maintenance of civil action by franchisee against franchisor; jurisdiction and venue; time for commencement of action

If a franchisor fails to comply with the requirements of section 2802, 2803, or 2807 of this title, the franchisee may maintain a civil action against such franchisor. Such action may be brought, without regard to the amount in controversy, in the district court of the United States in any judicial district in which the principal place of business of such franchisor is located or in which such franchisee is doing business, except that no such action may be maintained unless commenced within 1 year after the later of—

(1) the date of termination of the franchise or nonrenewal of the franchise relationship; or

(2) the date the franchisor fails to comply with the requirements of section 2802, 2803, or 2807 of this title.

(b) Equitable relief by court; bond requirements; grounds for nonexercise of court's equitable powers

(1) In any action under subsection (a) of this section, the court shall grant such equitable relief as the court determines is necessary to remedy the effects of any failure to comply with the requirements of section 2802, 2803, or 2807 of this title, including declaratory judgment, mandatory or prohibitive injunctive relief, and interim equitable relief.

(2) Except as provided in paragraph (3), in any action under subsection (a) of this section, the court shall grant a preliminary injunction if—

(A) the franchisee shows—

(i) the franchise of which he is a party has been terminated or the franchise relationship of which he is a party has not been renewed, and

(ii) there exist sufficiently serious questions going to the merits to make such questions a fair ground for litigation; and

(B) the court determines that, on balance, the hardships imposed upon the franchisor by the issuance of such preliminary injunctive relief will be less than the hardship which would be imposed upon such franchisee if such preliminary injunctive relief were not granted.

(3) Nothing in this subsection prevents any court from requiring the franchisee in any action under subsection (a) of this section to post a bond, in an amount established by the court, prior to the issuance or continuation of any equitable relief.

(4) In any action under subsection (a) of this section, the court need not exercise its equity powers to compel continuation or renewal of the franchise relationship if such action was commenced—

(A) more than 90 days after the date on which notification pursuant to section 2804(a) of this title was posted or personally delivered to the franchisee;

(B) more than 180 days after the date on which notification pursuant to section 2804(b)(2) of this title was posted or personally delivered to the franchisee; or

(C) more than 30 days after the date on which the termination of such franchise or the nonrenewal of such franchise relationship takes effect if less than 90 days notification was provided pursuant to section 2804(b)(1) of this title.

(c) Burden of proof; burden of going forward with evidence

In any action under subsection (a) of this section, the franchisee shall have the burden of proving the termination of the franchise or the nonrenewal of the franchise relationship. The franchisor shall bear the burden of going forward with evidence to establish as an affirmative defense that such termination or nonrenewal was permitted under section 2802(b), 2803, or 2807 of this title, and, if applicable, that such franchisor complied with the requirements of section 2802(d) of this title.

(d) Actual and exemplary damages and attorney and expert witness fees to franchisee; determination by court of right to exemplary damages and amount; attorney and expert witness fees to franchisor for frivolous actions

(1) If the franchisee prevails in any action under subsection (a) of this section, such franchisee shall be entitled—

(A) consistent with the Federal Rules of Civil Procedure, to actual damages;

(B) in the case of any such action which is based upon conduct of the franchisor which was in willful disregard of the requirements of section 2802, 2803, or 2807 of this title, or the rights of the franchisee thereunder, to exemplary damages, where appropriate; and

(C) to reasonable attorney and expert witness fees to be paid by the franchisor, unless the court determines that only nominal damages are to be awarded to such franchisee, in which case the court, in its discretion, need not direct that such fees be paid by the franchisor.

(2) The question of whether to award exemplary damages and the amount of any such award shall be determined by the court and not by a jury.

(3) In any action under subsection (a) of this section, the court may, in its discretion, direct that reasonable attorney and expert witness fees be paid by the franchisee if the court finds that such action is frivolous.

(e) Discretionary power of court to compel continuation or renewal of franchise relationship; grounds for noncompulsion; right of franchisee to actual damages and attorney and expert witness fees unaffected

(1) In any action under subsection (a) of this section with respect to a failure of a franchisor to renew a franchise relationship in compliance with the requirements of section 2802 of this title, the court may not compel a continuation or renewal of the franchise relationship if the franchisor demonstrates to the satisfaction of the court that—

(A) the basis for such nonrenewal is a determination made by the franchisor in good faith and in the normal course of business—

(i) to convert the leased marketing premises to a use other than the sale or distribution of motor fuel,

(ii) to materially alter, add to, or replace such premises,

(iii) to sell such premises,

(iv) to withdraw from the marketing of motor fuel through retail outlets in the relevant geographic market area in which the marketing premises are located, or

(v) that renewal of the franchise relationship is likely to be uneconomical to the franchisor despite any reasonable changes or reasonable additions to the provisions of the franchise which may be acceptable to the franchisee; and

(B) the requirements of section 2804 of this title have been complied with.

(2) The provisions of paragraph (1) shall not affect any right of any franchisee to recover actual damages and reasonable attorney and expert witness fees under subsection (d) of this section if such nonrenewal is prohibited by section 2802 of this title.

(f) Release or waiver of rights

(1) No franchisor shall require, as a condition of entering into or renewing the franchise relationship, a franchisee to release or waive—

(A) any right that the franchisee has under this subchapter or other Federal law; or

(B) any right that the franchisee may have under any valid and applicable State law.

(2) No provision of any franchise shall be valid or enforceable if the provision specifies that the interpretation or enforcement of the franchise shall be governed by the law of any State other than the State in which the franchisee has the principal place of business of the franchisee.

§ 2806. Relationship of statutory provisions to State and local laws

(a) Termination or nonrenewal of franchise

(1) To the extent that any provision of this subchapter applies to the termination (or the furnishing of notification with respect thereto) of any franchise, or to the nonrenewal (or the furnishing of notification with respect thereto) of any franchise relationship, no State or any political subdivision thereof may adopt, enforce, or continue in effect any provision of any law or regulation (including any remedy or penalty applicable to any violation thereof) with respect to termination (or the furnishing of notification with respect thereto) of any such fran-

chise or to the nonrenewal (or the furnishing of notification with respect thereto) of any such franchise relationship unless such provision of such law or regulation is the same as the applicable provision of this subchapter.

(2) No State or political subdivision of a State may adopt, enforce, or continue in effect any provision of law (including a regulation) that requires a payment for the goodwill of a franchisee on the termination of a franchise or nonrenewal of a franchise relationship authorized by this subchapter.

(b) Transfer or assignment of franchise

(1) Nothing in this subchapter authorizes any transfer or assignment of any franchise or prohibits any transfer or assignment of any franchise as authorized by the provisions of such franchise or by any applicable provision of State law which permits such transfer or assignment without regard to any provision of the franchise.

(2) Nothing in this subchapter shall prohibit any State from specifying the terms and conditions under which any franchise or franchise relationship may be transferred to the designated successor of a franchisee upon the death of the franchisee.

§ 2807. Prohibition on restriction of installation of renewable fuel pumps

(a) Definition

In this section:

(1) Renewable fuel

The term "renewable fuel" means any fuel—

(A) at least 85 percent of the volume of which consists of ethanol; or

(B) any mixture of biodiesel and diesel or renewable diesel (as defined in regulations adopted pursuant to section 7545(o) of Title 42 (40 CFR, part 80)), determined without regard to any use of kerosene and containing at least 20 percent biodiesel or renewable diesel.

(2) Franchise-related document

The term "franchise-related document" means—

(A) a franchise under this chapter; and

(B) any other contract or directive of a franchisor relating to terms or conditions of the sale of fuel by a franchisee.

(b) Prohibitions

(1) In general

No franchise-related document entered into or renewed on or after December 19, 2007, shall contain any provision allowing a franchisor to restrict the franchisee or any affiliate of the franchisee from—

(A) installing on the marketing premises of the franchisee a renewable fuel pump or tank, except that the franchisee's franchisor may restrict the installation of a tank on leased marketing premises of such franchisor;

(B) converting an existing tank or pump on the marketing premises of the franchisee for renewable fuel use, so long as such tank or pump and the piping connecting them are either warranted by the manufacturer or certified by a recognized standards setting organization to be suitable for use with such renewable fuel;

(C) advertising (including through the use of signage) the sale of any renewable fuel;

(D) selling renewable fuel in any specified area on the marketing premises of the franchisee (including any area in which a name or logo of a franchisor or any other entity appears);

(E) purchasing renewable fuel from sources other than the franchisor if the franchisor does not offer its own renewable fuel for sale by the franchisee;

(F) listing renewable fuel availability or prices, including on service station signs, fuel dispensers, or light poles; or

(G) allowing for payment of renewable fuel with a credit card,

so long as such activities described in subparagraphs (A) through (G) do not constitute mislabeling, misbranding, willful adulteration, or other trademark violations by the franchisee.

(2) Effect of provision

Nothing in this section shall be construed to preclude a franchisor from requiring the franchisee to obtain reasonable indemnification and insurance policies.

(c) Exception to 3-grade requirement

No franchise-related document that requires that 3 grades of gasoline be sold by the applicable franchisee shall prevent the franchisee from selling a renewable fuel in lieu of 1, and only 1, grade of gasoline.

Nos. 08-240 and 08-372

Supreme Court, U.S.
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v.

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Respondents.

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REPLY BRIEF FOR SHELL OIL PRODUCTS COMPANY LLC, MOTIVA ENTERPRISES LLC, AND SHELL OIL COMPANY

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CORPORATE DISCLOSURE STATEMENT

Pursuant to this Court's Rule 29.6, Shell Oil Products Company LLC, Motiva Enterprises LLC, and Shell Oil Company state that the corporate disclosure statement included in their opening brief remains accurate.

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REPLY BRIEF FOR SHELL OIL PRODUCTS COMPANY LLC, MOTIVA ENTERPRISES LLC, AND SHELL OIL COMPANY

The text of the PMPA could not be more clear: Unless a franchisor "terminate[s]" a franchise or "fail[s] to renew" a franchise relationship, the plaintiff has no claim. 15 U.S.C. § 2802(a). As the government explains, "[u]nder any usual understanding of the statutory language, a franchisor can be said to 'terminate' an existing franchise

* * * only when it forces an end to the franchisee's purchase of the franchisor's fuel, its use of the franchisor's trademark, or its occupation of the leased marketing premises." Gov't Br. 10. Likewise, a franchisor cannot have "fail[ed] to renew" a franchise relationship where "the parties entered into a new franchise agreement." *Id.* at 23. Congress deliberately limited the PMPA's cause of action to the critical events of termination and nonrenewal, leaving traditional state authority over franchise regulation otherwise intact.

The verdict in this case cannot be reconciled with any plausible interpretation of the statutory terms. Shell and Motiva did not "terminate any franchise * * * prior to the conclusion of [its] term." 15 U.S.C. § 2802(a)(1). It is undisputed that four of the eight dealers were still operating their franchises at the time of trial, almost five years after their alleged "termination," earning as much as $200,000 a year doing so. Shell Br. 10, 14. Three other dealers operated throughout the terms of their franchise agreements, selling their businesses or otherwise ceasing operations only *after* the agreements ended. *Id.* at 11 & n.8. And the eighth dealer left the service-station business for unrelated reasons. *Id.* at 11. In no sense were any of those franchises "terminated." Nor did Shell or Motiva "fail to renew" any franchise relationship. Seven of the eight dealers were offered and signed renewal agreements. *Id.* at 10-11 & nn.7-8. And the eighth left the service-station business before Motiva had any occasion to renew. *Id.* at 11.

The courts below nonetheless upheld a multimillion-dollar judgment on the Alice-in-Wonderland theory that "termination" does not really require a "termination": A dealer is "terminated," they held, whenever the franchisor's conduct represents "'such a material change that it

effectively ended the lease, even though the plaintiffs continued to operate the business.'" J.A. 447. That is a bit like pronouncing a patient "effectively deceased" even though he "continues to live an active lifestyle." The standard is "indeterminate, internally contradictory, and unworkable." Gov't Br. 8.

Plaintiffs' effort to rewrite the statute to support their claims is unavailing. The PMPA's text and history refute their contention that Congress intended to allow constructive termination claims at all, much less jettisoned the usual requirements of such claims by dispensing with any termination requirement altogether. And plaintiffs' attempt to extrapolate a cause of action by blending inapposite statutory provisions with a newly minted theory of "attempted" termination fares no better.

I. Shell And Motiva Did Not "Terminate" The Dealers' Franchises

Plaintiffs do not dispute that "no actual termination occurred" in this case. J.A. 432. At no point did Shell or Motiva refuse them any of the three statutory elements of their franchises—use of the trademark, supply of fuel, or use of the service-station premises. Plaintiffs therefore resort to a theory of "constructive" termination. They claim that Motiva's alleged breach of oral promises to continue the rent subsidy forever (despite written terms to the contrary) "constructively" terminated their franchises even though they continued as franchisees, receiving all three statutory franchise elements.

The PMPA's text and history foreclose those claims. In contexts where this Court has recognized "constructive" claims in the past (such as constructive discharge under Title VII), Congress acted against a backdrop of longstanding precedent in the most directly relevant context. When Congress enacted the PMPA, by contrast,

claims for constructive termination in the most relevant contexts—state franchise laws and the Uniform Commercial Code—were unheard of. In any event, even a "constructive" termination requires an end to the relationship. That did not occur here.[1]

A. The PMPA Does Not Permit Claims for Constructive Termination

1. *The Act's Text and History Foreclose Constructive Claims*

Plaintiffs assert (at 26) that constructive termination claims "fit[] well within the rights afforded by the PMPA." But as Shell and Motiva explained (at 31), the PMPA applies only where the "*franchisor* * * * terminate[s] [the] franchise." 15 U.S.C. § 2802(a)(1) (emphasis added). That phrasing does not by itself naturally en-

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[1] In a footnote in their statement (at 13-14 n.12), plaintiffs urge that Shell and Motiva "did not object to a contrary jury instruction" and "failed to raise this argument in their [Rule 50(a)] motion." As already explained, see Pet. Reply in No. 08-372, at 9 n.4, the first contention is both irrelevant and meritless. This case involves a challenge to the sufficiency of the evidence, not the jury instructions. An appellant need not object to jury instructions to preserve a sufficiency claim. See *Boyle* v. *United Techs. Corp.*, 487 U.S. 500, 513-514 (1988); 9B Wright & Miller, *Federal Practice and Procedure* § 2537, at 624-625 (3d ed. 2008). Plaintiffs also ignore counsel's express objection to the instruction below. See J.A. 368-369. While they quote a later comment that counsel "thought the *overall* instruction was fine," C.A. App. 1308 (emphasis added), they ignore that counsel renewed the earlier, specific objection at the same time, see *id.* at 1309. Plaintiffs' contention that the sufficiency argument was not preserved in the Rule 50(a) motion likewise fails. Plaintiffs never raised this objection in their brief in opposition. Cf. Br. in Opp. in No. 08-372, at 11 n.3. The objection is therefore waived. See Sup. Ct. R. 15.2. And Shell and Motiva *did* press the issue at length in their Rule 50(a) motion. See J.A. 208-213. Plaintiffs nowhere explain why that argument is inadequate.

compass "constructive" terminations—situations where the *franchisee abandons* one or more elements of the franchise in response to allegedly intolerable franchisor conduct. Under the statutory terms, it is not enough that the franchise *was terminated*. It must have been the *franchisor* that terminated it. In normal speech, "bathing" a child does not include causing the child to bathe himself; "combing" someone's hair does not include causing him to comb it himself. Likewise here, one would not ordinarily say that a "franchisor * * * terminate[d] [the] franchise" merely because its conduct led the franchisee to terminate the franchise itself. Congress knows how to cover not only *doing* an act but *causing* another to do it. See, *e.g.*, 18 U.S.C. §2(b) ("Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal."); 42 U.S.C. §1983 ("subjects, or causes to be subjected"); 15 U.S.C. §717t(a); 16 U.S.C. §825o(a); 47 U.S.C. §501. Congress did not do so here.

The legislative history erases any doubt. Despite lengthy hearings, committee reports, and floor debates, plaintiffs cannot identify a single statement endorsing constructive termination claims. To the contrary, the sole statement addressing the issue *rejects* them. See Shell Br. 31-32. At the Senate hearing, a *franchisee* trade group representative noted that the Act "deal[t] with only a part of our overall problem" because, although it would "provide needed re[l]ief in so far as the dealer's tenure in the service station is concerned," it did not address "economic terminations resulting from anticompetitive and other unfair marketing practices engaged in by some suppliers"—precisely what plaintiffs claim should constitute a "constructive" termination here. *Petroleum Marketing Practices Act: Hearing on S. 19, S.*

743, and H.R. 130 Before the Subcomm. on Energy Conservation and Regulation of the S. Comm. on Energy and Natural Resources, 95th Cong. 185 (1977) (Binsted). The representative understood that those "economic terminations" would have to be addressed by "separate legislation." *Ibid.* Yet plaintiffs ask this Court to read such claims into the PMPA itself.

Unable to ground constructive termination claims in the Act's text or history, plaintiffs urge the Court (at 26) to adopt them as a "legal fiction to meet the demands of 'convenience and justice.'" Where this Court has recognized "constructive" claims in the past, however, it has done so only because Congress enacted the relevant statute against a backdrop of settled precedent that Congress was presumed to have incorporated. As the government explains (at 20), "[t]he soundness of [constructive termination claims] depends in large measure on the longstanding recognition of the concept of 'constructive termination' in analogous contexts." For example, in *Pennsylvania State Police* v. *Suders*, 542 U.S. 129 (2004), this Court adopted the "constructive discharge" theory under Title VII only because the theory was well established in the employment context at the time that statute was enacted. The National Labor Relations Board had recognized constructive discharge claims since the 1930s; courts of appeals had upheld them for almost as long; and "[b]y 1964, the year Title VII was enacted, the doctrine was solidly established in the federal courts." *Id.* at 141-142. That made it reasonable to infer that Congress had intended to incorporate the doctrine into Title VII. Congress is presumed to be aware of settled interpretations, and a term "'transplanted from another legal source * * *

brings the old soil with it.'" *Evans* v. *United States*, 504 U.S. 255, 259-260 & n.3 (1992).[2]

Here, by contrast, there was no "longstanding recognition" of constructive termination claims in the "soil" of the contexts Congress considered relevant when it enacted the PMPA. To the contrary, such claims were unheard of. First, as Shell and Motiva explained (at 25-27), the Act's seemingly tautological definition of "termination" to include "cancellation," 15 U.S.C. §2801(17), draws on terminology from Section 2-106 of the Uniform Commercial Code. Congress's decision to incorporate terminology from the U.C.C. is highly significant: So far as we have found, *no* court has ever recognized claims for "constructive termination" or "constructive cancellation" under the U.C.C. See Shell Br. 32. Plaintiffs offer no other explanation for the origins of the Act's definitional provision, and make no attempt to reconcile their constructive termination theory with Congress's invocation of a context that rejects it.

Second, Congress focused on the state franchise statutes that regulated the same subject-matter and were the target of one of Congress's principal objectives—replacing the "uneven patchwork" of state laws with a "single, uniform set of rules." S. Rep. No. 95-731, at 19 (1978). In that context too, constructive termination claims were utterly unknown at the time the PMPA was enacted. As Shell and Motiva explained (at 32-34 & n.16), numerous statutes regulated franchise termination by 1978; claims for *actual* termination or non-renewal under

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[2] By its terms, moreover, Title VII covers not only "discharge[s]" but also any discriminatory "terms, conditions, or privileges of employment." 42 U.S.C. §2000e-2(a)(1); *Suders*, 542 U.S. at 143. The PMPA contains no similarly expansive language.

those statutes were common.[3] But the earliest case we have found addressing a claim for "constructive termination" of a franchise in those terms was decided in 1979—a year *after* Congress enacted the PMPA. See *Sexe* v. *Husky Oil Co.*, 475 F. Supp. 135, 137 (D. Mont. 1979). A doctrine more lacking in "longstanding recognition" is difficult to imagine.

Plaintiffs do not attempt to fill that glaring gap—they do not cite a *single* pre-1978 case recognizing a claim for constructive termination of a franchise. The government proposes only one—*American Motors Sales Corp.* v. *Semke*, 384 F.2d 192 (10th Cir. 1967). Gov't Br. 19. But as Shell and Motiva explained (at 34 n.16), *Semke* did not rely on a constructive termination theory. The statute at issue (the Automobile Dealers' Day in Court Act) was not limited to terminations, but covered *any* franchisor failure "'to act in good faith in performing or complying with any of the terms or provisions of the franchise.'" 384 F.2d at 194 n.1 (quoting 15 U.S.C. § 1222). And the court relied on legislative history peculiar to that statute. See

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[3] For examples from 1977 alone, see *C.A. May Marine Supply Co.* v. *Brunswick Corp.*, 557 F.2d 1163, 1164 (5th Cir. 1977); *Boatland, Inc.* v. *Brunswick Corp.*, 558 F.2d 818, 819-822 (6th Cir. 1977); *Russ Thompson Motors, Inc.* v. *Chrysler Corp.*, 425 F. Supp. 1218, 1219-1220 (D.N.H. 1977); *Sundown Imports, Inc.* v. *Ariz. Dep't of Transp.*, 565 P.2d 1289, 1290 (Ariz. App. 1977); *Am. Motors Sales Corp.* v. *New Motor Vehicle Bd.*, 69 Cal. App. 3d 983, 985 (1977); *Int'l Harvester Co.* v. *Calvin*, 353 So. 2d 144, 146-147 (Fla. App. 1977); *AAMCO Indus., Inc.* v. *DeWolf*, 250 N.W.2d 835, 838-840 (Minn. 1977); *Am. Motors Sales Corp.* v. *Perkins*, 251 N.W.2d 727, 728 (Neb. 1977); *Sw. Distrib. Co.* v. *Olympia Brewing Co.*, 565 P.2d 1019, 1020-1021, 1024-1025 (N.M. 1977); *Am. Oil Co.* v. *Columbia Oil Co.*, 567 P.2d 637, 639-641 (Wash. 1977).

id. at 195.[4] Congress's failure to replicate that broad statutory text or legislative history in the PMPA renders *Semke* irrelevant here. In any event, one ambiguous case that does not even mention "constructive termination" is hardly comparable to the "solidly established" and "long-standing" precedent that the government deems necessary and that this Court invoked to justify constructive discharge claims under Title VII in *Suders*.

Plaintiffs assert (at 36-37 & n.19) that five *post-enactment* cases acknowledge constructive termination claims under other franchise statutes. But those cases—most of which postdate the PMPA by more than 20 years—shed no light on Congress's intent when it enacted the statute in 1978. And the post-enactment case law is at best mixed: At least *eight* courts have expressly *repudiated* the constructive termination doctrine under other franchise statutes. See Shell Br. 32-33 & n.15.[5] The theory thus is not "solidly established" even now.

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[4] The court acknowledged that the dealer (not the franchisor) had terminated the dealership, and could find "no case" upholding liability on those facts. 384 F.2d at 195. Nonetheless, the court invoked a comment in the ADDCA's legislative history addressing franchisor coercion that "'*relate[d] to* the termination • • • of the dealer's franchise.'" *Ibid.* (emphasis added). Whatever the merits of that legislative-history-driven interpretation, *Semke* does not stand for any general theory of constructive termination.

[5] Although plaintiffs assert (at 36 n.19) that "[m]any" of those cases "do not foreclose a constructive termination theory," they take issue with only two, and even as to those, they err. The court in *Speed Auto Sales, Inc.* v. *American Motors Corp.*, 477 F. Supp. 1193 (E.D.N.Y. 1979), squarely held that, "[s]ince the complaint fails to allege that Speed has been terminated • • •, no claim is stated under the law." *Id.* at 1199. The court further observed that the complaint failed to allege even a constructive termination, but that was an alternative holding. See *ibid.* ("Even were such a theory cognizable • • •."). The court in *Fuller Ford, Inc.* v. *Ford Motor Co.*, No.

2. Barnes's *Assignment-Based Theory Cannot Support Constructive Termination Claims*

Courts allowing constructive termination claims under the PMPA have relied on the assignment-based theory of *Barnes* v. *Gulf Oil Corp.*, 795 F.2d 358 (4th Cir. 1986). *Barnes* held that a plaintiff could establish constructive termination by showing either an assignment of the franchise followed by a breach of one of the three franchise elements, or an assignment that is invalid under state law. See *id.* at 361-364. As Shell and Motiva explained (at 34-40), neither theory makes sense. The PMPA addresses terminations, not lawful assignments followed by contract breaches or ineffective assignments already addressed by state law. The government refuses to endorse either of *Barnes*'s theories, and plaintiffs only further obfuscate them.

a. Plaintiffs deny that *Barnes*'s "assignment-plus-breach" theory effectively federalizes all breach-of-contract claims. Citing the decision below, they urge (at 33) that constructive termination requires a "'breach of the lease [that] "was such a material change that it effectively ended the lease, even though the plaintiffs continued to operate the business."'" But that standard is so incoherent as to provide no limit at all. It is like asking a

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CIV. 00-530-B, 2001 WL 920035 (D.N.H. Aug. 6, 2001), held that the state-law termination provision "does not apply to constructive terminations." *Id.* at *13. The court merely noted in the course of reaching that conclusion that the plaintiff might nonetheless have a claim under a *different* provision that did *not* address terminations. See *ibid.* Plaintiffs also purport to distinguish *Barney Holland Oil Co.* v. *FleetCor Technologies, Inc.*, 275 F. App'x 351 (5th Cir. 2008), and *Robert Basil Motors, Inc.* v. *General Motors Corp.*, No. 03-CV-315A, 2004 WL 1125164 (W.D.N.Y. Apr. 17, 2004), but the former case was cited for a different point (at 43 n.22), and the latter was not cited at all.

jury to decide whether a defendant is "effectively guilty" even though he is innocent, or "effectively negligent" even though he exercised due care. Plaintiffs insist (at 34) that the court's standard is no less manageable than the "materiality" standard used in securities-fraud cases. Not so: Materiality determinations may leave room for judgment, but at least the standard is coherent.

Nor do plaintiffs explain why the "assignment-plus-breach" theory is a plausible interpretation of the PMPA's text. Plaintiffs insist that the court of appeals' standard has "solid roots" in the PMPA because it "harkens back" to the Act's provision declaring a dealer's breach of a material franchise provision to be grounds for termination. See Dealers Br. 33-34 (citing 15 U.S.C. §2802(b)(2)(A)). But the fact that the Act identifies a dealer's breach as one *justification* for termination does not prove that Congress meant to *equate* mere contract breaches with "terminations." Plaintiffs' further assertion (at 34) that the standard "harkens back" to the Act's supposed "incorporat[ion] [of] state assignment law which invokes a 'materiality' standard" is circular—it assumes the legitimacy of the assignment-based theory it seeks to defend. Besides, the whole point of the First Circuit's unintelligible standard was to *dispel* the notion that "any material breach of the lease would necessarily be sufficient," J.A. 447; the standard thus cannot possibly "harken[ ] back" to provisions that *invoke* a "materiality" standard. And plaintiffs never even begin to explain why a *prior valid assignment* should convert breaches into terminations.

Plaintiffs' attempt to defend *Barnes*'s alternative theory—that an assignment amounts to a constructive termination if it is invalid under state law—fares no better. *Barnes* simply misunderstood assignment law: An inva-

lid assignment may be *ineffective*, and thus fail to transfer the assignor's contract to the assignee, but it does not terminate the contract between the original parties. See Shell Br. 39 (citing authorities). Plaintiffs cite nothing in response. They assert that Congress intended "terminate" to include invalid assignments because an unrelated statutory provision defines "failure" to exclude noncompliance with invalid franchise terms. Dealers Br. 34-35 (citing 15 U.S.C. §2801(13)(C)). But the Act does not define "terminate" as a "failure" to do anything. And even if it did, the "failure" definition would not transform invalid (and thus ineffective) assignments into terminations.

b. The government conspicuously refuses to endorse *Barnes*'s assignment-based theory. And the government agrees that there can be no "termination" absent an end to one of the three franchise elements. Gov't Br. 10. The government suggests, however, that a constructive termination could exist if a franchisor's conduct compelled a dealer "to abandon one (or more) of the franchise elements"—by, for example, "foreclos[ing] any reasonable possibility that the business could be operated profitably." *Id.* at 21. We assume the government is not suggesting that the PMPA converts franchisors into guarantors of dealer profitability; the government presumably means to require at least that the dealer's loss of a statutory franchise element have resulted from the franchisor's wrongful conduct with respect to that element. See Shell Br. 44 & n.25. Even so, the government's proposed standard—never before adopted by any court applying the PMPA—would exponentially expand liability under the Act. Until now, "'constructive termination' claims under the PMPA * * * have been limited to one specific context: when a franchisor has assigned the franchise

agreement to a third party." *Atl. Autocare, Inc.* v. *Shell Oil Prods. Co. LLC*, 605 F. Supp. 2d 463, 467-470 & nn.3-4 (S.D.N.Y. 2009) (canvassing precedents); see Shell Br. 34-35.[6] Under the government's approach, however, unsuccessful dealers dissatisfied with franchisor policies could claim constructive termination *whether or not* their franchises had ever been assigned.

Shell and Motiva agree with the government that *Barnes*'s assignment-based theory is incoherent. But the appropriate remedy is to reject the assignment-based theory of constructive termination, not to reject the assignment-based *limitation* on that theory. As explained above, the PMPA's text and history simply do not support claims for constructive termination. See pp. 4-9, *supra*. The fact that two decades of case law under the PMPA have limited constructive termination claims to the quirky area of assignments is yet another reason to reject the doctrine, not to import far broader theories that are wholly foreign to the PMPA.

3. *Constructive Termination Claims Frustrate Congress's Objectives*

Plaintiffs appeal to policy (at 21), but Congress's policies point the other way. Congress sought to "*clearly define* the rights and obligations of the parties." S. Rep. No. 95-731, at 19 (emphasis added). The standard that plaintiffs defend, however, is incoherent. See pp. 10-11, *supra*; Gov't Br. 8. And *any* constructive termination standard destroys the certainty Congress sought to achieve.

Constructive termination claims inevitably embroil courts and juries in intractable line-drawing exercises.

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[6] Plaintiffs identify only a single, unreported decision allowing a claim outside the assignment context. See Dealers Br. 33 n.18.

While extreme (and thus unrealistic) hypotheticals are easy to imagine, constructive termination claims invite *every* unsuccessful dealer to make a federal case out of its failure by claiming that franchisor fuel prices, rent, or trademark policies caused it to fail. But countless factors affect a dealer's viability, and Congress did not enact the PMPA to make franchisors guarantors of dealer profitability. Constructive termination suits would require a jury to determine not only why the dealer failed, but also whether a "typical" dealer would have failed under those circumstances (and what a "typical" dealer is). See Shell Br. 44 & n.24. The moment one expands the Act beyond *actual* terminations of a franchise—*i.e.*, *actual* refusals by the franchisor to provide one of the three statutory franchise elements—Congress's goal of "clearly defin[ing]" the parties' rights and obligations gives way to conflict and protracted litigation.

Plaintiffs' interpretation also defies Congress's objective of "provid[ing] certainty and uniformity" in the area of termination and non-renewal by replacing an "uneven patchwork" of state-law standards with a "single, uniform set of rules." S. Rep. No. 95-731, at 16, 19. As *amicus curiae* API explains (at 18-22), constructive termination claims cause the statutory definition of "terminate" to turn on state law—a result impossible to square with Congress's goal of uniformity. Plaintiffs point (at 42-43) to other provisions of the PMPA that reference state law. But those discrete provisions merely confirm that Congress knew how to reference state law when it wanted to. None suggests that Congress meant to destroy the very uniformity it sought to achieve by incorporating varying state-law standards into the definition of "terminate" at the heart of the Act.

The PMPA, moreover, preempts inconsistent state law. 15 U.S.C. §2806(a)(1). Expanding the Act to reach constructive terminations thus ousts traditional state authority. See Shell Br. 29. In that regard, the PMPA is very different from the statute this Court construed to allow constructive discharge claims in *Suders*, which expressly *preserved* state remedies. See 42 U.S.C. §2000e-7. This Court does not lightly infer that Congress "significantly changed the federal-state balance." *United States* v. *Bass*, 404 U.S. 336, 349 (1971). Plaintiffs' construction would do precisely that.

That expansive displacement of state law is wholly unnecessary. Dealers claiming *constructive* termination *necessarily* have state-law remedies, because a breach of the franchise agreement is an element of the claim. See Shell Br. 44 n.25. Here, for example, plaintiffs prevailed on breach-of-contract claims for the very conduct—Motiva's discontinuance of the rent subsidy—that formed the basis of their constructive termination claims. *Id.* at 28. Constructive termination claims thus are not necessary to protect dealers from capricious rent increases, $1,000-per-gallon fuel prices, or any other obvious breach of the franchise agreement that threatens the dealer's viability. They merely distort resolution of state-law contract disputes by inviting plaintiffs to convert state-law claims into "constructive terminations" to obtain punitive damages, attorney's and expert witness fees, and liberal injunctive relief under federal law. See *id.* at 29-30.

That is precisely why Congress limited the PMPA to franchise *terminations*—actual deprivations of one of the three statutory elements of the franchise. Congress understood that franchise relationships are "basically contractual in nature," but it saw a gap in contract remedies: Franchisors could use their greater bargaining power to

insist on broad contractual termination rights and then exercise those rights over trifling franchisee errors. See S. Rep. No. 95-731, at 17-18. Congress filled that gap by regulating terminations. Congress thus was not seeking to federalize breach-of-contract claims; it was concerned primarily about terminations *permitted by* the contract terms. Plaintiffs, however, would transform the PMPA into precisely the federal breach-of-contract remedy Congress chose not to enact.

B. Even If the PMPA Permitted Constructive Termination Claims, It Would Not Apply Where the Dealer Continued as a Franchisee

In any event, no plausible theory of constructive termination could support the judgment here. Even assuming the PMPA reaches constructive terminations, a franchisor's conduct "does not fall within the statutory prohibition unless it has the effect of ending at least one of the three prerogatives that the franchise entails." Gov't Br. 11-12. Plaintiffs never abandoned any of those three elements. To the contrary, they operated as franchisees long after their alleged "termination," earning as much as $200,000 a year doing so.

1. *"Constructive" Claims in Other Contexts Require an End to the Relationship*

Plaintiffs' constructive termination theory cannot be reconciled with *any* other area of the law, because "analogous common-law doctrines have traditionally 'require[d] an actual severance of the relationship.'" Gov't Br. 18. An employee claiming constructive discharge "'must leave the workplace'"; a tenant claiming constructive eviction "'must move out'"; a franchisee claiming constructive termination under other statutes must end the franchise. See *id.* at 18-19; Shell Br. 41-43 & nn.20, 22; J.A. 446. The termination is "constructive" only in

the sense that the plaintiff rather than the defendant ends the relationship—not in the sense that there is no "termination" at all.

While plaintiffs do not dispute that constructive discharge requires an end to employment, they suggest in passing (at 38 & n.20) that constructive eviction might not require an end to the tenancy. Two of the cases they cite, however, merely recognize that a tenant forced to abandon *part of* the premises can sue for constructive eviction *from that portion*. See *Minjak Co.* v. *Randolph*, 140 A.D.2d 245, 248 (N.Y. App. Div. 1988); *County Holding Corp.* v. *Brati Inc.*, No. 2001-38KC, 2002 WL 1275031, at *1 (N.Y. Sup. App. Term Mar. 15, 2002). One of those cases *expressly reaffirms* the "requirement of abandonment of premises." *Minjak*, 140 A.D.2d at 248. The third case merely holds that a tenant confronted with conditions that would justify abandoning the premises and suing for constructive eviction can repair the condition and offset the cost from his rent instead. See *Marini* v. *Ireland*, 265 A.2d 526, 535 (N.J. 1970). Finally, while plaintiffs urge that modern courts take a more contractual view of the landlord-tenant relationship in place of the "traditional remedy of constructive eviction *which requires abandonment of premises*," Dealers Br. 38-39 & n.21 (emphasis added), that undercuts their position. Franchise agreements are likewise contractual, and dealers confronted with breaches can pursue contract remedies—precisely what plaintiffs successfully did here.

Plaintiffs, moreover, do not dispute that, in the most analogous area—state franchise statutes—courts require an actual end to the relationship. Plaintiffs quibble (unsuccessfully) over how many courts allow constructive claims *at all*. See pp. 9-10 & n.5, *supra*. But they cannot dispute that—with only a few exceptions, all of which

postdate the PMPA's enactment—courts that do recognize constructive claims require an end to the franchise. See Shell Br. 42-43 & nn.22-23.

Unable to dispute the legal landscape, plaintiffs ask this Court to ignore it because petroleum franchises are supposedly "'unique.'" Dealers Br. 38. Not so. No less than service-station franchisees, tenants or employees are parties to "continuing relationship[s]" and may have made substantial "investment[s]" in their homes or careers. Cf. *ibid.* There is no reason the law should require longtime tenants to abandon their homes before claiming constructive eviction, or longtime employees to sacrifice their jobs before claiming constructive discharge, but not require a service-station operator to end its franchise before claiming constructive termination. And plaintiffs do not even attempt to explain why service-station franchises are distinguishable from myriad other franchises covered by state statutes that require an end to the franchise (and often do not allow constructive claims at all).

Plaintiffs finally urge the Court (at 40) to ignore the employment and landlord/tenant contexts because Congress had no "particular or analogous settings in mind." But that underscores why the Court should not recognize constructive termination claims at all. The PMPA's text does not encompass such claims. See pp. 4-5, *supra*. The only way the Court could recognize the claims is *if* Congress had some analogous context in mind where the claims had traditionally been allowed. The accurate observation that there is no evidence Congress meant to incorporate constructive termination concepts from employment or landlord/tenant law is precisely why the PMPA should not be read to authorize constructive termination claims. The contexts that Congress focused on

were not employment and landlord/tenant law, but state franchise statutes and the Uniform Commercial Code—contexts where constructive termination claims had *never* been recognized when the PMPA was enacted and are not clearly established even today. See pp. 7-9, *supra*.

2. *The Act's Limitations Period and Injunctive Remedies Do Not Support Plaintiffs' Claims*

Plaintiffs argue that other provisions of the PMPA show that Congress contemplated claims by dealers that continue as franchisees. They urge (at 22) that the Act's statute of limitations demonstrates that Congress could not have intended "terminate" to mean "end" because that provision lists both the date of termination and the date of violation as alternative accrual dates. See 15 U.S.C. §2805(a). Some PMPA violations, however, do not occur until *after* termination. See, *e.g.*, *id.* §2802(d)(1) (requiring franchisor to remit portion of condemnation award to dealer where franchise was terminated due to condemnation); *id.* §2802(d)(2) (requiring franchisor to offer right of first refusal if franchise was terminated due to destruction of premises but station was rebuilt). The statute of limitations' two-pronged structure thus does not prove that "terminate" means something other than "terminate." It shows only that some violations do not occur upon termination.

Plaintiffs alternatively argue (at 20-28) that, because the Act authorizes preliminary injunctive relief, 15 U.S.C. §2805(b)(2), Congress could not have intended to require franchisees to go out of business before invoking the Act. Plaintiffs are correct that a dealer seeking preliminary relief must prove that "the franchise of which he is a party *has been terminated*." *Id.* §2805(b)(2)(A)(i) (emphasis added). But that does not necessarily mean the dealer must have *gone out of business* before bringing

suit. A franchisor must furnish a dealer with a notice of termination in advance of the date the termination "takes effect." *Id.* §2804(a)(2). As a result, in cases of *actual* termination, the date a dealer is "terminated" and the date the dealer stops operating are typically distinct. As the government explains (at 16 n.6), just as an employee who receives a pink slip could describe himself as *having been* "fired" even if his last day at work has not yet arrived, a dealer that receives a notice of termination can describe itself as *having been* "terminated" even though the termination "takes effect" later. Similarly, where a franchisor refuses to provide a statutory element such as fuel, the dealer could describe itself as *having been* "terminated," even if it can operate for a few days before its inventory runs out. The PMPA's requirement that the franchise "ha[ve] been terminated" before the dealer seeks an injunction thus does not suggest that "terminate" means anything other than "terminate."

Moreover, notwithstanding plaintiffs' repeated invocations of courts' historic "equitable powers" (*e.g.*, Dealers Br. 21, 41), this is not a case about injunctive relief to prevent *anticipated* violations. Plaintiffs sought injunctive relief below but were denied it because they waited too long; they have not appealed that ruling. See J.A. 123-126. This is a case about retrospective monetary relief for alleged "terminations" that never occurred. Plaintiffs recovered over a million dollars in damages plus another million in attorney's and expert witness fees on the theory that their franchises were "terminated" when they in fact continued to operate as franchisees, using the same fuel, trademark, and premises. Nothing in the Act's injunctive framework supports that result.

3. *Plaintiffs' "Attempted" Termination Theory Fails*

Unable to show even a constructive termination, plaintiffs reinvent their suit as one for *attempted* termination. They allege that Shell and Motiva "*attempt[ed]* to terminate the[ir] franchise[s]" and "*intended* to * * * force an end" to them. Dealers Br. 20, 25 (emphasis added). They claim that this alleged attempt—even though unsuccessful—entitles them to damages. See *id.* at 27. That theory is baseless.

The dealers do not cite a single case that has ever allowed damages for "attempted" termination under the PMPA. Nothing in the Act's text, structure, or legislative history suggests Congress authorized such claims. That is not surprising. The very concept of civil liability for "attempt" is anomalous. Attempt offenses are well known in *criminal* law. See *United States* v. *Resendiz-Ponce*, 549 U.S. 102, 106-107 (2007); Model Penal Code §5.01. But they are largely unknown in tort law. See Goldberg & Zipursky, *Unrealized Torts*, 88 Va. L. Rev. 1625, 1636-1641 (2002). As Judge Posner succinctly put it: "There are no 'attempted torts.'" *United States* v. *Stefonek*, 179 F.3d 1030, 1036 (7th Cir. 1999); see also *Cenco Inc.* v. *Seidman & Seidman*, 686 F.2d 449, 453 (7th Cir. 1982). The notion that Congress jettisoned that longstanding principle in enacting the PMPA is fanciful. The dealers' attempt theory, moreover, was neither pressed in the court below, see Dealers C.A. Br. 40-50, nor presented to the jury, see J.A. 372-374. It cannot salvage the judgment.

4. *Congress Did Not Intend the PMPA To Be One-Sided*

Finally, plaintiffs assert (at 40-42) that Congress intended the PMPA to be one-sided legislation that favors

only dealers. That is not true. The Senate and House reports both state that the Act seeks to "*strike a balance* between the at times conflicting interests of the parties." S. Rep. No. 95-731, at 15 (emphasis added); H.R. Rep. No. 95-161, at 13 (1977) (same). Similar comments recur throughout the legislative history. See Gov't Br. 13. That balance is reflected in the statute's careful pairing of provisions that protect dealers with other provisions that, for example, allow franchisors to respond to changing market conditions, 15 U.S.C. §2802(b)(3)(A), and preempt inconsistent state laws, *id.* §2806(a)(1). Those latter provisions are hard to explain if Congress sought to benefit only dealers.

Plaintiffs urge (at 41) that the PMPA is "remedial legislation" that must be "liberal[ly] construe[d]." But one could conversely argue (as many courts have held) that the PMPA should be *narrowly* construed because it derogates from franchisors' common-law property rights. See, *e.g.*, *Clark* v. *BP Oil Co.*, 137 F.3d 386, 391 (6th Cir. 1998). The balance Congress struck is best effectuated, not by tilting the playing field, but by giving a fair and evenhanded reading to the provisions Congress saw fit to enact. The PMPA by its terms regulates franchise "terminat[ions]" while leaving other aspects of the relationship to state law. Awarding millions of dollars for "termination" to dealers still operating their franchises requires not a "liberal" construction but a lawless one.

II. Shell And Motiva Did Not "Fail To Renew" Any Franchise Relationship

Plaintiffs' constructive non-renewal claims fail for similar reasons. Just as "terminate" means "terminate," "fail to renew" means "fail to renew." Because plaintiffs were offered and signed renewal agreements, Motiva did not "fail to renew" their franchise relationships. Plain-

tiffs insist (at 44) that Motiva "constructively" failed to renew the relationships because the new agreements were intended to drive them out of business. Plaintiffs distort the record,[7] but their accusations are ultimately beside the point. Plaintiffs were offered and signed renewal agreements. As a result, Motiva could not have "fail[ed] to renew" their franchise relationships.

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[7] For example, plaintiffs' implausible suggestion (at i) that Shell *formed Motiva* to drive them out of business has no support in the record at all. Cf. *Texaco Inc.* v. *Dagher*, 547 U.S. 1, 6 n.1 (2006). Plaintiffs also assert (at 8) that Shell was "[u]nwilling to negotiate a buyout" and "devised a plan to force its franchisees out of business," but they cite nothing to support either claim. Plaintiffs contend (at 9) that the new agreements included "rent increases and other terms that were designed to discourage the dealers from renewing and to enable Motiva to convert the franchise-operated stations to direct operations." Instead of citing evidence, however, they cite the jury instructions and verdict. J.A. 375, 382. Plaintiffs state (at 9 & n.9) that the new rents were expected to "result in the 'closure' of franchise stations" and a "transition to direct operations," but the cited testimony merely notes that *some* franchise stations might not be able to pay the higher rents, not that Shell wanted to eliminate its franchisees. See C.A. App. 3615-3616, 3628. Plaintiffs assert (at 10) that two dealers "sold their businesses below market value," but the cited testimony establishes only the obvious fact that franchise values went down when rents went up. *Id.* at 882-884, 978. Plaintiffs also contend (at 10) that some dealers remained profitable only because of "ancillary businesses," but they refer to things like selling "snack[s]," "cigarette[s]," and "lottery [tickets]." *Id.* at 917. Given that the entire service-station industry had shifted to offering such amenities (the very reason for the change in industry rent structure), see J.A. 402, it is hardly surprising that a service station would not remain competitive if it stopped selling everything but gasoline. Finally, while plaintiffs repeatedly make claims about what the jury "found" (*e.g.*, Dealers Br. i), the jury made no specific factual findings, see J.A. 376-386, and—given the compelling evidence of good-faith business reasons for the challenged lease changes, see J.A. 402-403—there is no reason to believe the jury accepted every theory plaintiffs offered.

A. The Act Requires Non-Renewal

Plaintiffs urge (at 45) that the Act does not require a notice of non-renewal to support a claim. That is true but irrelevant. What the Act *does* require is a "fail[ure] to renew." 15 U.S.C. §2802(a)(2). A franchisor can fail to renew a dealer *lawfully* by giving the required notice. Alternatively, the franchisor can fail to renew the dealer *unlawfully*—for example, by refusing to renew *without* the required notice. But there can be no claim for non-renewal without a "fail[ure] to renew" of some sort.

Plaintiffs assert (at 46) that there is no "good reason" why a dealer's rights should depend on whether the dealer is presented with an "unlawful lease on a 'take-it-or-leave-it' basis" rather than a notice of non-renewal. But there are legitimate reasons why a multistate franchisor like Motiva might insist on uniform terms, and nothing in the PMPA prohibits insistence on standardized contracts. See J.A. 218; *Abrams Shell* v. *Shell Oil Co.*, 343 F.3d 482, 485, 488-489 (5th Cir. 2003). Plaintiffs, moreover, simply beg the question by labeling the proposed leases "unlawful" when the cause of action by its terms requires a non-renewal, not a renewal on terms the dealer dislikes.

Plaintiffs insist (at 46-47) that they confront a "Hobson's Choice" because, unless they sign the renewal agreement, they risk having to "cease operations." But the whole point of the Act's relaxed injunctive standard—which requires not a probability of success but mere "serious questions" and omits any irreparable-harm requirement, 15 U.S.C. §2805(b)(2)—is to ensure that dealers with legitimate claims do *not* have to "cease operations." Dealers confronted with objectionable renewal terms can follow the course set forth in the statute: refuse to sign the renewal agreement; receive a notice of non-renewal

well before its effective date; and challenge the non-renewal while obtaining a preliminary injunction to maintain the status quo. See Shell Br. 50-52. As the government recognizes (at 28), dealers with meritorious claims face no difficulty vindicating their rights.[8]

B. Ratification Principles Are Irrelevant

Plaintiffs contend (at 48-50) that the court below erroneously relied on a "ratification" theory. They claim that, although they signed renewal agreements, the court should have disregarded the renewals because they allegedly reserved their rights by signing "under protest." But the problem with plaintiffs' suit is not that plaintiffs "ratified" the renewal agreements by signing them. The problem is that, where a dealer is offered and signs a renewal agreement, the franchisor has not "fail[ed] to renew" the franchise relationship—a prerequisite to any non-renewal claim. 15 U.S.C. §2802(a)(2). Because there is no violation, there is nothing to waive by ratification.

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[8] The government argues that the Act covers not only *actual* non-renewals but also *constructive* non-renewals where a franchisor "insist[s] on changes that a franchisee would be forced to reject because continued operation under such terms would not be reasonably possible." Gov't Br. 23. The doctrine of "constructive non-renewal" has no more basis in the Act's text or history than the doctrine of constructive termination, and should be rejected for the same reasons. See pp. 4-9, *supra*. Nonetheless, so long as constructive non-renewal claims require an end to the relationship, the issue lacks practical significance. A dealer's refusal to agree to proposed renewal terms is grounds for non-renewal. 15 U.S.C. §2802(b)(3)(A). Consequently, where a franchisor proposes renewal terms so burdensome that the dealer is forced to reject them, the franchisor ordinarily would issue a notice of non-renewal based on the failure to agree, at which point there would be an *actual* non-renewal. See Shell Br. 50-52; *Dersch Energies, Inc.* v. *Shell Oil Co.*, 314 F.3d 846, 863 (7th Cir. 2002); J.A. 452. Superimposing a "constructive" claim adds nothing.

Authorities such as U.C.C. §1-207(1) are thus inapposite. Those authorities merely explain that conduct that might otherwise waive a pre-existing claim—such as paying an illegal tax or accepting defective performance—does not have that effect if done "under protest." The PMPA, however, confers no claim except in the two areas Congress addressed—termination and non-renewal. Absent a non-renewal, there is no right to sue, so there is nothing to "reserve" by signing under protest. The dealers did not waive valid claims by signing the renewal agreements; they simply made it impossible to prove an essential element of their claims—that Motiva "fail[ed] to renew" the franchise relationships. See Shell Br. 53; Gov't Br. 23-24.[9]

C. *Pro Sales* Is Unpersuasive

Finally, plaintiffs rely (at 51-54) on the Ninth Circuit's decision in *Pro Sales, Inc.* v. *Texaco, U.S.A.*, 792 F.2d 1394 (9th Cir. 1986). But no other court of appeals has adopted the Ninth Circuit's position, while four circuits have now flatly rejected its approach. See Shell Br. 50. As the Seventh Circuit explained in *Dersch Energies, Inc.* v. *Shell Oil Co.*, 314 F.3d 846, 864-866 (7th Cir. 2002), the PMPA contains a carefully calibrated notice-and-preliminary-injunction scheme for resolving renewal disputes. Constructive non-renewal claims allow dealers to bypass that structure—a point *Pro Sales* ignored. See

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[9] Plaintiffs' claim (at 49) that their attorney "wrote to Motiva (before any dealer signed a renewal lease) to protest the legality of the new leases" is misleading. The cited letter does not identify any of the eight dealers, and its objections have nothing to do with the rent policies at issue in this suit. See J.A. 129-131.

Shell Br. 52-53. Nothing in plaintiffs' brief undermines *Dersch*'s analysis.[10]

Plaintiffs finally attempt (at 54) to distinguish *Dersch* on the ground that they promptly filed suit. *Dersch*, however, did not turn on the suit's timeliness. See 314 F.3d at 865. The PMPA prohibits only "fail[ure] to renew," not renewal on terms a dealer finds objectionable but nevertheless accepts. See 15 U.S.C. § 2802(a)(2). Timeliness is irrelevant where, as here, there has been no non-renewal at all.

CONCLUSION

For the foregoing reasons and those set forth in Shell and Motiva's opening brief, the judgment of the court of appeals should be reversed with respect to the termination claims (No. 08-372) and affirmed with respect to the non-renewal claims (No. 08-240).

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[10] Plaintiffs criticize *Dersch* (at 53-54) for requiring a notice of non-renewal to establish a claim. But *Dersch* required only what the Act requires: a non-renewal. See 314 F.3d at 866. And plaintiffs' assertion (at 52) that *Dersch* "addressed a violation of section 2805(f), not section 2802," is simply wrong. See *id.* at 852 (plaintiff alleged violations of "both § 2802 and § 2805(f)(1)"); Mem. in Resp. to Pet. in No. 08-240, at 23-24.

Respectfully submitted.

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In The
Supreme Court of the United States

MAC'S SHELL SERVICE, INC., ET AL.,

Petitioners,

v.

SHELL OIL PRODUCTS COMPANY LLC, ET AL.,

Respondents.

SHELL OIL PRODUCTS COMPANY LLC, ET AL.,

Petitioners,

v.

MAC'S SHELL SERVICE, INC., ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

SUPPLEMENTAL BRIEF FOR MAC'S SHELL SERVICE, INC., ET AL.

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INTRODUCTION

This case presents a dispute over whether the Petroleum Marketing Practices Act ("PMPA" or "Act") protects franchisees when a franchisor acts to force them out of business. Shell and Motiva assert that the Act requires the franchisor to end the franchise before it is "terminated" within the meaning of the statute. Imposing intolerable conditions designed to force a dealer to abandon his station is not enough, they argue, to invoke the protection of the PMPA. Likewise, so long as a dealer is offered and signs a renewal lease, Shell and Motiva believe that it does not matter that the lease contains terms intended to force the dealer out of business or that the dealer is bullied into signing under threat of losing his livelihood. The record confirms that Shell and Motiva understood that achieving their goal of converting franchise-operated stations to direct operations depended upon their ability to "overcome [the] restrictions" imposed by the PMPA. C.A. App. 1530, 1533. One way of doing this, an executive quipped, was to "run [the dealers] over with a truck." C.A. App. 3606. The economic burdens imposed by higher rents had the same effect. The arguments advanced by Shell and Motiva to "overcome" the restrictions of the Act do not comport with the plain language, design or purpose of the statute. Congress surely understood the might of multi-national oil companies when it enacted the PMPA and did not permit them to avoid

the Act by cunning and intimidation. If Shell and Motiva's arguments are accepted, the PMPA's protections will be lost.

I. CONDUCT DESIGNED TO FORCE FRANCHISEES OUT OF BUSINESS VIOLATES THE PMPA

In their merits brief, Shell and Motiva concede that a franchisor may "terminate" a franchise "even absent an express statement of termination."[1] Brief for Shell Oil Products, *et al.* at 34. They now contend that there is no "termination" where "intolerable franchisor conduct" forces a franchisee to abandon his franchise. Reply Brief for Shell Oil Products, *et al.* ("Reply Brief") at 5. "[I]t is not enough that the franchise *was terminated*," they argue, "[i]t must have been the *franchisor* that terminated it." *Id.* A franchisor's refusal to sell gasoline to a franchisee is a "termination," according to Shell and Motiva, but charging a franchisee $100 per gallon with the expectation that the franchisee will be unable to compete in the marketplace and eventually will abandon his station, is not. Thus, Shell and Motiva urge the Court to hold that the PMPA permits franchisors to circumvent the prescribed grounds and methods for terminating franchises by creating such intolerable

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[1] The Solicitor agrees with this position. Brief for the United States at 21.

conditions that the franchisee has no choice but to abandon his station.

The Solicitor takes a different view, acknowledging that "[i]n an appropriate case, a franchisee . . . can make out a claim of constructive or informal termination without abandoning any of the basic components of its operation." Brief of the United States at 16. According to the Solicitor, the franchisee must seek injunctive relief to prevent the franchisor from engaging in conduct that would leave the franchisee "no reasonable alternative but to abandon . . . its operations." *Id.* at 21. The Solicitor agrees that it would make little sense for Congress to provide expressly for injunctive relief but require that the injury actually occur before such relief can be granted. *Id.* at 16. In different circumstances, Shell and Motiva acknowledge that a plaintiff seeking injunctive relief does not "have [to go] *out of business* before bringing suit."[2] Reply Brief at 19-20.

The Solicitor's recognition of a franchisee's rights under the Act where the franchisor acts to terminate a franchise on grounds or in a manner inconsistent with the statute is appropriate, but nothing in the

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[2] Indeed, those dealers who were able to remain in business through trial, *see, e.g.*, n.3 *infra*, helped minimize the damages caused by the violation of the Act. *Cf. Faragher v. Boca Raton*, 524 U.S. 775, 806 (1998) (a victim has a duty "to use such means as are reasonable under the circumstances to avoid or minimize the damage" that results from the violation of the statute) (citations omitted).

statutory scheme predicates these rights upon a franchisee seeking injunctive relief. The claim arises and is actionable because the franchisor acts to terminate the franchise in contravention of the Act. An injunction, if granted, preserves the *status quo* while the parties resolve their claims. If a franchisee's request for injunctive relief is denied, it would make little sense to require the franchisee to dismiss his case, wait until the business fails, and then re-file an action for damages. The statutory mechanism Congress created contemplates that alleged violations of the statute may be enjoined, allowing the franchisee to stay in business, litigate the merits of the claim, and recoup any damages. Should a franchisee who is subject to the same misconduct, but who is unable to obtain an injunction, be foreclosed from pursuing a claim under the statute merely because he is able, through whatever means,[3] to remain in business? We

---

[3] Shell and Motiva's frequent references to certain dealers' earnings and the fact that some stations remained open through the trial distorts the record and are ultimately beside the point. *See, e.g.*, Reply Brief at 2. Although Shell and Motiva claim that Mac's Shell, for example, earned as much as $200,000 a year, they ignore that Mac's Shell also operated a towing business and owned investment property. Those businesses contributed to the company's profitability, but were not part of the facilities Shell and Motiva leased to the franchisee. C.A. App. 942, 950, 966, 968. Despite the rent increases and commercially unreasonable prices charged by the franchisor for gasoline, J.A. 384-85, revenue from the towing operations and investment property helped Mac's Shell remain in business. Likewise, Cynthia Karol contemplated bankruptcy, but kept her station open by borrowing $100,000 and cashing-in a $40,000 retirement account. C.A.

(Continued on following page)

think not. The Act does not differentiate between a franchisee who obtains an injunction, remains in business, and pursues a claim and a franchisee who manages to stay in business without an injunction, but is nevertheless injured by the franchisor's conduct. In both instances, the franchisee is entitled to pursue a claim for damages. 15 U.S.C. § 2805(d)(1).

1. Citing *Pennsylvania State Police v. Suders*, 542 U.S. 129 (2004), Shell and Motiva argue that this Court has recognized constructive claims in Title VII cases only because Congress supposedly enacted Title VII "against a backdrop of settled precedent that Congress was presumed to have incorporated." Reply Brief at 6. Reliance on this incorporation theory in *Suders* or in any of the other Title VII cases is not apparent. Rather, in its Title VII cases, the Court recognized that "although [Title VII] mentions specific employment decisions with immediate consequences, the scope of its prohibition is 'not limited to economic or tangible discrimination' . . . and that it covers more than 'terms' and 'conditions' in the narrow contractual sense." *National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 115-16 (2002) (citations omitted). Thus, the Court has repeatedly stated that Title VII's statutory language "evinces a congressional intent to strike at the entire spectrum of disparate treatment." *Suders*, 542 U.S. at 143;

App. 847, 851. Sid Prashad borrowed money and remained in business with the assistance of his mother, who worked 40-60 hours a week without pay. C.A. App. 1000-01.

Morgan, 536 U.S. at 116; *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993); *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986).[4] Here, the same may be said of the Act. *See Patel v. Sun Co., Inc.*, 141 F.3d 447, 459 (3d Cir. 1998) (noting that Congress "outlawed all franchisee terminations and nonrenewals generally but then created certain exceptions"). There can be no doubt that Congress intended the Act to cover all forms or attempts at termination and nonrenewal, and in drafting its provisions, Congress recognized the potential for franchisors to attempt to circumvent the Act. What the Court said with respect to Title VII is applicable here. "Title VII comes into play before the harassing conduct leads to a nervous breakdown." *Harris,* 510 U.S. at 22. Here, the Act's protections must be given effect before a dealer loses his livelihood.

Shell and Motiva also argue that "there was no 'longstanding recognition' of constructive termination claims in the 'soil' of the contexts Congress considered relevant when it enacted the PMPA."[5] Reply Brief at 7. Whatever else may be said about the status of

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[4] Similarly, *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984), does not suggest that constructive discharge claims in the labor law context were accepted based on the inference that Congress intended to incorporate such claims when it enacted the National Labor Relations Act.

[5] Contrary to Shell and Motiva's assertion (Reply Brief at 7), there is no evidence in the legislative history (and Shell and Motiva cite none) that Congress intended to invoke or incorporate into the PMPA anything from the UCC.

constructive claims in other contexts, by 1994, when Congress amended the PMPA, courts confronting the issue recognized constructive terminations and non-renewals. *See, e.g., Chestnut Hill Gulf v. Cumberland Farms, Inc.*, 940 F.2d 744, 750-51 (1st Cir. 1991); *May-Som Gulf, Inc. v. Chevron U.S.A.*, 869 F.2d 917, 922 (6th Cir. 1989); *Barnes v. Gulf Oil Corp.*, 795 F.2d 358, 363-64 (4th Cir. 1986); *Pro Sales, Inc. v. Texaco, U.S.A.*, 792 F.2d 1394, 1399 (9th Cir. 1986); *Meyer v. Amerada Hess Corp.*, 541 F. Supp. 321, 329 (D.N.J. 1982); *Siecko v. Amerada Hess Corp.*, 569 F. Supp. 768, 771 n.2 (E.D. Pa. 1983); *Sun Franchise Assoc. v. Sun Refining and Marketing Co.*, 1992 WL 97359 (E.D. Pa. 1992); *Dean v. Kerr-McGee Refining Corp.*, 714 F. Supp. 1155, 1158 (W.D. Okla. 1988); *Cedar Brook Serv. Station v. Chevron U.S.A.*, 746 F. Supp. 268, 272-73 (E.D.N.Y. 1989); *Ackley v. Gulf Oil Corp.*, 726 F. Supp. 353, 360 (D. Conn. 1989), *aff'd*, 889 F.2d 1280 (2d Cir. 1989). *But see, McGinnis v. Star Enters.*, No. 93-1234, 1993 WL 455587 (5th Cir. 1993); *Deamor, Inc. v. Mobil Oil Corp.*, 1990 WL 124927 (E.D. Pa. 1990). Congress enacted the 1994 Amendments to "affirm and clarify" certain provisions of the Act by adding additional protections for franchisees. Congress noted that "[d]uring the 16 years since the PMPA was enacted, the provisions of Title I have been the subject of many judicial interpretations. The Committee now believes that further legislation is desirable in order to assure that the PMPA is consistently and clearly understood and interpreted." H.R.

Rep. No. 737, 1994 WL 530965, 1994 U.S.C.C.A.N. 2779. *See also* S. Rep. No. 387, 1994 WL 5347750 (same); *Darling v. Mobil Oil Corp.*, 864 F.2d 981, 991 n.1 (2d Cir. 1989) (citing comments of Representative Dingell, principal sponsor of the PMPA in 1978, noting judicial interpretations of the Act that were inconsistent with the Act's language and purpose). While the 1994 Amendments affirmed and clarified the Act's provisions and overruled cases like *O'Shea v. Amoco Oil Co.*, 886 F.2d 584 (3d Cir. 1989) and *Bellmore v. Mobil Oil Co.*, 783 F.2d 300 (2d Cir. 1986),[6] Congress left undisturbed the rulings upholding constructive terminations and nonrenewals.[7] *See Faragher*, 524 U.S. at 791-92 (noting Congress's

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[6] In *O'Shea*, the Third Circuit rejected the franchisee's claim that a termination based on an unenforceable provision of the contract under state law violated the PMPA. In *Bellmore*, the Second Circuit ruled that the Act did not preempt payments of goodwill required by Connecticut law. The 1994 Amendments barred illegal or unenforceable terminations under state law and prohibited mandatory goodwill payments. 15 U.S.C. §§ 2801(13), 2806(a)(2). Congress also reconfirmed the limited scope of preemption under the Act, H.R. Rep. No. 103-387, 103d Cong., 2d Sess. 1994) at 4, thus resolving the conflict regarding the scope of preemption. *See Arabian v. BP Am.*, 898 F. Supp. 703 (N.D. Cal. 1995) (discussing the contrary court of appeals preemption decisions).

[7] Nor did the 1994 Amendments otherwise limit the protections accorded franchisees under the Act. Rather, the 1994 Amendments broadened the protections by, among other things, proscribing terminations of franchises based on provisions void or unenforceable under state law. 15 U.S.C. § 2801(13).

amendment to the liability provisions of Title VII since the *Meritor* decision without any modification of the holding).[8]

That the Act does not expressly acknowledge constructive claims is irrelevant. The dealers are unaware of any statute which contains language framing the cause of action to expressly include "constructive" claims. As this Court's cases establish, Title VII does not expressly include that language, yet there is no doubt Title VII covers constructive claims. The observation by Shell and Motiva that Congress knew how to cover not only doing an act but causing another to do it is likewise inapposite. Reply Brief at 5. The nature of a constructive claim does not involve the question of causing another to do an act.

Shell and Motiva argue that the First Circuit's standard is incoherent, likening it to asking a jury to decide whether a defendant is "effectively guilty" even though he is innocent, or "effectively negligent" even though he exercised due care. Reply Brief at 10-11. There is nothing "effectively guilty even though . . . innocent" about Shell and Motiva's conduct: the jury determined that Shell and Motiva intended to

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[8] Comments of a trade group representative during the PMPA hearings regarding economic terminations (Reply Brief at 5) provide no insight into the meaning of the Act and are not evidence of Congress's intent. *See, e.g., Bryan v. United States*, 524 U.S. 184, 196 (1998); *NLRB v. Fruit Packers*, 377 U.S. 58, 66 (1964).

squeeze out the dealers. Nor is there any question but that such a scheme expressly contravenes the Act. Moreover, Shell and Motiva's only rejoinder to the dealers' analogy to the materiality standard in securities-fraud cases is that such materiality determinations may leave room for judgment. But, as the Title VII cases demonstrate, standards used to measure a defendant's conduct and liability are not necessarily the stuff of scientific dissection. *Harris*, 510 U.S. at 22 (standard of abusive work environment requiring sufficiently severe or pervasive conduct "is not, and by its nature cannot be, a mathematically precise test"). There is nothing incoherent about a standard for constructive termination which requires the jury to conclude that the elimination of the subsidy had to be "such a material change that it effectively ended the lease, even though the [dealers] continue[d] to operate [their] business." J.A. 373, 379-80, 449-50.

II. NEW LEASE TERMS WERE INTENDED TO CONVERT DEALER STATIONS TO DIRECT OPERATIONS

Shell and Motiva claim that the dealers "distort the record" and suggest that the Motiva leases were not intended to force the dealers out of business. Reply Brief at 23. The verdict refutes any notion that the new leases were adopted for any other purpose. "The question for you," the district court charged the

jury, "is were the rent increases and other new provisions in the Motiva leases designed to discourage the plaintiffs from renewing and to enable Motiva to convert the stations – to convert the stations to company-owned ones?" J.A. 375. The jury answered affirmatively and found that the Motiva leases amounted to a constructive nonrenewal of the dealers' leases. J.A. 382.[9]

Nevertheless, Shell and Motiva argue that the dealers have no claim under the Act because they signed the renewal agreements. The Solicitor acknowledges that a franchise relationship may be "constructively" non-renewed where the franchisor "insists on changes that a franchisee would be forced to

---

[9] Shell and Motiva's efforts to recast the facts of this case are equally unavailing. Despite the First Circuit's contrary finding, they claim that it is "implausible" to suggest that "Shell *formed Motiva* to drive [the dealers] out of business. . . ." Reply Brief at 23, J.A. 447-48. The "Strategic Marketing Initiative" was developed by Motiva to "convert" franchise operated stations to stations operated directly by Motiva at an anticipated cost of several hundred million dollars. *See, e.g.*, C.A. App. 1530, 1533, 2675, 2700, 3603-06, 3638-48. The jury concluded that the new leases offered by Motiva were designed to unlawfully convert the franchise stations to direct operations, J.A. 374-75, 382, and that Motiva planned to decrease the number of franchise operated stations in certain markets in Massachusetts by more than 70%. *See, e.g.*, C.A. App. 1723, 1728, 1750. By early 2000, Motiva had targeted the stations to be converted, including the dealers' stations. C.A. App. 923-31, 1620-1728, 1729-73, 1835-38. On this record, it was certainly plausible to conclude that Motiva was formed as part of the effort to convert the stations.

reject because continued operation under such terms would not be reasonably possible," but nevertheless agrees that no claim may be brought where the franchisee signs a renewal lease. Brief for the United States at 23. The dealers' signatures on the Motiva leases were no more an acceptance of the leases than a person who signs a contract under duress. *Cf. International Underwater Contractors, Inc. v. New England Tele. and Tele. Co.*, 8 Mass. App. Ct. 340, 342, 393 N.E. 2d 968, 970 (1979) (contract signed under duress is not binding). The dealers protested the new terms, reserved their rights to challenge the legality of the renewal leases, brought suit, and then signed the leases under protest. J.A. 129-31, 450. On this record, it cannot be said that the dealers accepted the terms of the renewal leases.

CONCLUSION

For these reasons, the judgment of the court of appeals should be affirmed on the termination claim (No. 08-373) and reversed on the nonrenewal claim (No. 08-240).

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MAC'S SHELL SERVICE, INC., ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS IN NO. 08-372 AND RESPONDENTS IN NO. 08-240

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QUESTIONS PRESENTED

The Petroleum Marketing Practices Act (PMPA or Act), 15 U.S.C. 2801 *et seq.*, limits the circumstances in which petroleum refiners or distributors may "terminate" a franchise or "fail to renew" a franchise relationship involving the sale or supply of motor fuel.

In No. 08-372, *Shell Oil Products Co. LLC* v. *Mac's Shell Service, Inc.*, the question presented is whether a franchisee may recover for "constructive termination" under the PMPA when it continues to operate the franchise by purchasing the same fuel, reselling it under the franchisor's trademark, and occupying the leased marketing premises.

In No. 08-240, *Mac's Shell Service, Inc.* v. *Shell Oil Products Co. LLC*, the question presented is whether a franchisee who signs a renewal agreement "under protest" and operates under the terms of the agreement may maintain a claim for "constructive nonrenewal" under the Act.

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In the Supreme Court of the United States

No. 08-240

MAC'S SHELL SERVICE, INC., ET AL., PETITIONERS

v.

SHELL OIL PRODUCTS COMPANY LLC, ET AL.

No. 08-372

SHELL OIL PRODUCTS COMPANY LLC, ET AL., PETITIONERS

v.

MAC'S SHELL SERVICE, INC., ET AL.

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS IN NO. 08-372 AND RESPONDENTS IN NO. 08-240

INTEREST OF THE UNITED STATES

The questions presented in these cases concern the scope of the restrictions on termination and nonrenewal in the Petroleum Marketing Practices Act (PMPA or the Act), 15 U.S.C. 2801 *et seq.* The Department of Energy is responsible for summarizing the relevant provisions of the PMPA in the Federal Register. See 43 Fed. Reg. 38,743 (1978); 61 Fed. Reg. 32,786 (1996). Because the scope of the Act may affect competition in petroleum marketing, this case is of concern to the Antitrust Division of the United States Department of Justice. At the Court's invitation, the United States filed a brief as amicus curiae at the petition stage of these cases.

STATEMENT

1. The Petroleum Marketing Practices Act (PMPA or the Act), 15 U.S.C. 2801 *et seq.*, prohibits petroleum refiners and distributors from "terminat[ing]" any franchise involving the sale or supply of motor fuel "prior to the conclusion of the term, or [its] expiration," or from "fail[ing] to renew any franchise relationship," except for enumerated reasons and after written notice. 15 U.S.C. 2801(1)(A), 2802, 2804.[1] The Act defines the term "franchise" to include any contract allowing a retailer or distributor to use the franchisor's trademark, to purchase motor fuel for resale, or to occupy leased marketing premises. 15 U.S.C. 2801(1)(B). These three types of agreements are commonly described as the "statutory elements of the franchise." Pet. App. 3 n.1.[2] The term "franchise relationship" is defined as the parties' "respective motor fuel marketing or distribution obligations and responsibilities" in connection with the franchise. 15 U.S.C. 2801(2). "'[T]ermination' includes cancellation," and "fail to renew" means "a failure to reinstate, continue, or extend the franchise relationship." 15 U.S.C. 2801(14) and (17).

If a franchisor violates specified provisions of the PMPA, its franchisee may bring suit in federal district court. 15 U.S.C. 2805. The Act provides for a wide range of remedies, including compensatory damages, reasonable attorneys' fees and expert costs, punitive damages, and "such equitable relief" as the court deems necessary to address the statutory violation. 15 U.S.C. 2805(a), (b)(1), (d) and (e). The Act also requires district courts to grant preliminary injunctive relief preserving the status quo if the franchisee shows that the franchisor has terminated the

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[1] Special rules apply to trial and interim franchises. 15 U.S.C. 2803.

[2] Unless otherwise noted, all references to "Pet." and "Pet. App." are to the petition and appendix in No. 08 240.

franchise or failed to renew the franchise relationship, that "there exist sufficiently serious questions going to the merits to make such questions a fair ground for litigation," and that the balance of equities favors such relief. 15 U.S.C. 2805(b)(2). The PMPA preempts state law governing termination and nonrenewal to the extent such law is inconsistent with the Act. 15 U.S.C. 2806(a)(1).

2. Between 1982 and 1998, Shell Oil Products Co. LLC (Shell) offered its franchisees a rent subsidy called the Variable Rent Program (VRP). Pet. App. 3. That subsidy reduced the monthly rent by a set amount for every gallon of gasoline the franchisee sold above a specified threshold. *Ibid.* Shell renewed the subsidy in annual notices to franchisees. *Ibid.* Although the notices "explicitly provided for cancellation with thirty days' notice," various oral representations suggested that "the [s]ubsidy or something like it would always exist." *Id.* at 3-4.

In 1998, Shell and Texaco created a joint venture, Motiva Enterprises LLC (Motiva), to conduct their domestic gasoline marketing operations. Pet. App. 3. Shell assigned its rights and duties under the relevant franchise contracts to Motiva, which initially replaced the VRP with a different rent subsidy. *Ibid.* On January 1, 2000, however, Motiva ended that replacement subsidy, causing the Shell stations to pay more rent. *Id.* at 4.[3] Motiva did not include the subsidy in the new leases it offered Shell franchisees when their franchise agreements expired. *Ibid.*[4]

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[3] The amount of the rent increase following the elimination of the subsidy varied by dealer. Compare, *e.g.*, J.A. 339 (annual rent for Mac's Shell Southbridge station increased from $61,784 to $64,893), with J.A. 336 (annual rent for Karol's station increased from $59,447 to $99,120).

[4] In addition to eliminating the subsidy, the new Motiva leases changed the way in which rent was computed (using an asset-based methodology similar to the one that Texaco had used before the creation of Motiva). J.A. 218, 236-238. For some stations, annual rent was

3. On July 27, 2001, 63 Shell dealers filed suit in federal district court, asserting state and federal claims. The dealers principally alleged that their property leases had incorporated the rent subsidy and that the elimination of the subsidy breached those leases. Pet. App. 5-6. In addition to alleging violations of their state-law contract rights, the dealers asserted that Shell's and Motiva's conduct had violated two provisions of the PMPA. First, the dealers alleged that Shell had "constructive[ly] terminat[ed]" their franchises, in violation of 15 U.S.C. 2802(a)(1), by assigning the contracts to Motiva and eliminating the rent subsidy. Pet. App. 6. Second, the dealers claimed that Motiva's offer of new contracts without the rent subsidy amounted to a "constructive nonrenewal" of their franchise relationships, in violation of 15 U.S.C. 2802(a)(2). Pet. App. 6, 27. The dealers contended that a constructive nonrenewal had occurred even though they had in fact signed renewal agreements, because they had done so "under protest." *Id.* at 27.

On July 30, 2003, the dealers moved for a preliminary injunction under the PMPA. The district court denied the motion, explaining that because the dealers had "waited years before seeking preliminary injunctive relief," the court was unable to "turn the clock back" and "preserve the status quo." Pet. App. 49-50 (citation omitted).

After a 15-day trial involving eight dealers selected by the court, the jury found against Shell and Motiva on all claims and awarded the dealers $3.3 million, including $1.3 million on the constructive termination claim and $1.2 million on the constructive nonrenewal claim. J.A. 376-386.

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less under the new Motiva leases than under the preexisting leases after elimination of the subsidy. See, *e.g.*, J.A. 316-318, 339 (Mac's Shell Southbridge signed a new Motiva lease in October 2001; its annual rent decreased to $56,600 in 2002); J.A. 314-315, 336 (Karol signed a new Motiva lease in December 2000; her station's annual rent decreased to $66,371 in 2001).

Both before and after the verdict, the defendants moved for judgment as a matter of law on the dealers' constructive termination and constructive nonrenewal claims, noting that seven of the eight dealers had signed and operated under renewal agreements and that four of the eight dealers were still operating their stations at the time of trial. J.A. 212-213, 391-396. The district court denied the motions, 08-372 Pet. App. 34a-54a, 58a-59a, and the defendants appealed, Pet. App. 2.

4. The court of appeals affirmed in part and reversed in part. Pet. App. 1-41. On the PMPA claims, the court affirmed the judgment on the constructive termination claim but reversed the judgment on the constructive nonrenewal claim. *Id.* at 20-32.

a. In sustaining the jury verdict on the constructive termination claim, the court of appeals explained that a franchisee may establish a violation of Section 2802(a)(1) by showing that, as a result of assigning the franchise, "the franchisor breached one of the three statutory components of the franchise agreement (the contract to use the refiner's trademark, the contract for the supply of motor fuel, or the lease of the premises)." Pet. App. 20-21 (citation omitted). The court concluded that the dealers had made that showing because they had "prove[d] to the jury's satisfaction" that, by eliminating the rent subsidy, "Motiva breached the lease component of the franchise agreements." *Id.* at 21.

The court of appeals rejected the defendants' argument that, to constitute a constructive termination under the PMPA, any "breach must amount to a total deprivation of one of the three elements of the franchise." Pet. App. 22; see *id.* at 24. The court held that the "appropriate threshold" for a constructive termination claim was reflected in the jury instructions given in this case, which stated that the breach must constitute "such a material change that it effectively ended the lease, even though the plaintiffs continued

to operate the business." *Id.* at 23. The court acknowledged that the doctrines of constructive discharge in employment law and constructive eviction in landlord-tenant law "require an actual severance of the relationship: [t]he employee must leave the workplace; the tenant must move out." *Id.* at 22-23. The court concluded, however, that such a rule should not apply under the PMPA because "sunk costs, optimism, and the habit of years might lead franchisees to try to make the new arrangements work, even when the terms have changed so materially as to make success impossible," and the "congressional plan would be frustrated by requiring a franchisee to go out of business before invoking the protections of the PMPA." *Id.* at 23 (citation omitted).

b. The court of appeals reversed the judgment of liability on the constructive nonrenewal claim, concluding that the PMPA does not encompass such a claim "where the franchisee has signed and operates under the renewal agreement complained of." Pet. App. 27-32. Citing the structure of the PMPA, which requires notice of nonrenewal and permits the franchisee to seek preliminary injunctive relief under a relaxed standard, the court explained that "Congress intended to limit the reach of the PMPA to cases where either a notice is given or an actual nonrenewal has taken place." *Id.* at 28. The court therefore concluded that the Act "requires that franchisees faced with objectionable contract terms refrain from ratifying those terms by executing the contracts (even 'under protest')." *Id.* at 30.

Because in this case "the Dealers signed the new agreements 'under protest' and continued in operation under the new agreements," Pet. App. 30, the court of appeals held that they could not claim constructive nonrenewal. Were the rule otherwise, the court explained, a "franchisee [could] sign the contract and simultaneously challenge it," giving the franchisee the benefit of the contract with nothing to lose "[i]f its claims were rejected by the courts." *Ibid.* In

the court's view, that result would violate "the balance Congress has struck" in the PMPA. *Id.* at 30-31.

SUMMARY OF ARGUMENT

I. The court of appeals erred in upholding the jury verdict in the dealers' favor on their "constructive termination" claim.

A. Under any usual understanding of the PMPA's language, a franchisor does not "terminate" a franchise (15 U.S.C. 2802(a)(1)) unless it brings at least one statutory element of the franchise to an end. A franchisor may terminate the franchise explicitly by formally ending the agreement, or it may do so "constructively" by engaging in conduct that effectively forces the franchisee to abandon the franchise. In either case, however, the franchisor's conduct must actually cause the franchise to come to an end. The text of the Act leaves no room for the court of appeals' expansive conception of "constructive termination," under which a franchise is "treated" as "terminated" even though the challenged conduct does not prevent the franchisee from continuing to exercise all three prerogatives the franchise entails.

B. The court of appeals viewed its interpretation as necessary to effectuate the Act's overarching purposes. Because the statutory text is unambiguous, that type of analysis was unwarranted. In any event, the purpose, structure, and history of the PMPA do not support the court of appeals' holding.

The Act is a compromise measure that reflects a delicate accommodation of the competing interests of franchisors and franchisees. Expanding the Act's coverage to conduct that does not "terminate" the franchise would upset that balance. The court of appeals' concern that a literal reading would leave franchisees without adequate recourse to challenge unlawful conduct ignores the availability of both pre-

liminary injunctive relief under the Act and state-law remedies that Congress deliberately left in place. And the court of appeals' indeterminate, internally contradictory, and unworkable standard, under which a franchise that is ongoing in each of its basic components nevertheless can be declared "effectively ended," runs contrary to Congress's goal of providing franchisees with predictable and nationally uniform results.

C. The court of appeals' approach is also inconsistent with the understanding of "constructive termination" that courts have developed in other contexts. As the court of appeals recognized, the common-law analogues of that doctrine have traditionally "require[d] an actual severance of the relationship." Pet. App. 23. Courts have generally applied the concept of "constructive termination" to encompass conduct that forces an actual end to the relationship, even though it does not take the form of an express or formal termination. The court of appeals offered no sound basis for applying a more expansive understanding of that concept to the PMPA.

D. The dealers failed to establish that their franchises were "terminated" within the meaning of the Act. All eight dealers continued to avail themselves of the statutory elements of the franchises long after the rent subsidy was eliminated. That continued operation precluded any reasonable finding that the withdrawal of the subsidy effectively compelled the dealers to abandon their businesses.

II. The court of appeals correctly held that a franchisee cannot assert a claim for "nonrenewal" under the Act after it has signed and operated under a renewal agreement. As a matter of plain language, there is no "failure to renew" when the franchisor has in fact continued the franchise relationship by offering a new agreement that the franchisee has accepted. The dealers contend that they preserved their rights under the PMPA by signing the renewed agreements

"under protest." But a dealer who enters into a new franchise agreement despite dissatisfaction with its terms has nonetheless "renewed" the franchise relationship and therefore has no cause of action for "nonrenewal" to preserve.

The structure and purpose of the Act confirm that understanding of the term "fail to renew." As part of Congress's accommodation of the interests of franchisors and franchisees, the Act permits franchisors to make efficient marketing and distribution changes at the time of renewal, while affording franchisees that object to such modified terms a procedural mechanism to obtain preliminary injunctive relief preserving the status quo while the dispute is in litigation. That balance would be seriously undermined if franchisees could sign a renewal agreement "under protest," continue operating the franchise under the new terms, and then later challenge the renewal agreement as a "constructive nonrenewal."

Contrary to the dealers' contention, a franchisee presented with a coercive offer to renew has options beyond agreeing to the franchisor's proposed terms or going out of business. A franchisee in those circumstances may reject the offer and obtain injunctive relief preventing a threatened nonrenewal from taking effect. There is no merit to the dealers' argument that the PMPA's injunctive remedy is inadequate because franchisees lack the resources promptly to seek such relief. The Act allows successful dealers to recover attorneys' fees, expert costs, compensatory damages, and, in some circumstances, punitive damages. 15 U.S.C. 2805(d)(1). Such provisions are normally considered sufficient to encourage suit.

The evidence at trial showed that seven dealers signed renewal agreements, and that the eighth sold his franchise before the existing agreement expired. The dealers therefore did not establish that the defendants "fail[ed] to renew" their franchise relationships, and the court of appeals cor-

rectly granted judgment in the defendants' favor on the constructive nonrenewal claims.

ARGUMENT

I. A FRANCHISEE MAY NOT RECOVER FOR "CONSTRUCTIVE" TERMINATION IF IT CONTINUES TO SELL THE SAME FUEL, USE THE SAME TRADEMARK, AND OCCUPY THE SAME PREMISES

The court of appeals held that "a breach of the franchise agreement need not result in complete deprivation of a statutory element of the franchise to support a constructive termination" claim under 15 U.S.C. 2802(a)(1). Pet. App. 24. That conclusion was incorrect. Under any usual understanding of the statutory language, a franchisor can be said to "terminate" an existing franchise, "constructively" or otherwise, only when it forces an end to the franchisee's purchase of the franchisor's fuel, its use of the franchisor's trademark, or its occupation of the leased marketing premises. Because the dealers in this case continued to exercise each of those three prerogatives long after the defendants withdrew the rent subsidy, the defendants did not "terminate" the franchises in violation of the PMPA.

A. The Prohibition Imposed By 15 U.S.C. 2802(a)(1) Is Limited By Its Terms To Franchisor Conduct That Terminates The Franchise

The PMPA does not federalize all contract disputes between petroleum companies and their franchisees or establish general federal standards of fair dealing in petroleum marketing. Rather, it addresses only a narrow category of conduct. *Inter alia*, the Act provides that, except for specified reasons, a motor-fuel franchisor may not "terminate any franchise" before its expiration date. 15 U.S.C. 2802(a)(1). The Act defines the term "franchise" to encompass "a set of definite agreements" concerning the lease of the marketing

premises, the supply of the franchisor's motor fuel, and the use of the franchisor's trademark. Pet. App. 7-8; 15 U.S.C. 2801(1)(B).

1. The scope of the prohibition on unlawful terminations is evident from the plain language of the PMPA. "Terminate" is a well-understood term that had the same meaning when Congress enacted the PMPA in 1978 as it has now: "bring to an end." *The Random House Dictionary of the English Language* 1465 (1st ed. 1966). Consistent with that common understanding, Congress provided in the PMPA that "[t]he term 'termination' includes cancellation," 15 U.S.C. 2801(17), a word that similarly denotes an end or nullification. Thus, a franchisor "terminate[s]" a "franchise" under the PMPA only by engaging in conduct that brings to an end at least one of the three statutory components of the franchise.

A franchisor typically terminates a franchise by explicitly ending one or more of the franchise elements prior to the expiration date. Even without such an explicit abrogation, however, the franchisor could "terminate" the franchise within the meaning of Section 2[illegible]a)(1) by engaging in conduct that effectively forces an end to one of the statutory elements. Thus, a franchisor could terminate a franchise by offering the franchisee fuel only on terms so disadvantageous as to amount to a refusal to supply, or by taking actions that, as a practical matter, prevent the franchisee from continuing to occupy the leased premises. In those circumstances, the "termination" might be termed "constructive," although the term "informal" is more accurate. See *Dersch Energies, Inc.* v. *Shell Oil Co.*, 314 F.3d 846, 864 n.17 (7th Cir. 2002) ("In the context of the PMPA, constructive means 'not directly expressed, but inferred,' *The Compact Oxford English Dictionary* 322 (2d ed. 1989), i.e., an indirect or informal termination or nonrenewal."). Under any circumstances, however, the franchisor's conduct does not fall within the statutory

prohibition unless it has the effect of ending at least one of the three prerogatives that the franchise entails.

2. The court of appeals adopted an expansive conception of "constructive termination" that cannot be reconciled with the plain meaning of the Act. The court of appeals held that a "constructive termination" occurs when a contractual breach is so "material" that it should be "treat[ed]" as a "termination of the franchise," Pet. App. 23, 26, even though there is neither an "actual abandonment" of the franchise nor an end of any of its elements, *id.* at 23. Thus, although the court purported to apply a standard requiring conduct that "effectively ended" the franchise, it upheld a verdict in the dealers' favor "even though the [dealers] continued to operate the business[es]" long after the rent subsidy had been withdrawn. *Ibid.* By holding that the elimination of the rent subsidy could violate Section 2802(a)(1) even though the dealers continued to occupy the leased premises, use Shell's trademark, and purchase Shell gasoline for resale, the court of appeals effectively expanded the scope of the statutory prohibition to encompass conduct that is unfavorable to the franchisee but does not "terminate" the franchise in any meaningful sense.

B. Extending The Statutory Prohibition To Conduct That Does Not Terminate The Franchise Is Inconsistent With The History, Structure, And Purposes Of The PMPA

The court of appeals viewed its interpretation of Section 2802(a)(1) as necessary to further Congress's goals in enacting the PMPA. Pet. App. 22-24. Even if the court's understanding of Congress's overall objectives in enacting the statute were correct, it would provide no sound basis for giving Section 2802(a)(1) a reading broader than its text will bear. See, *e.g.*, *Connecticut Nat'l Bank* v. *Germain*, 503 U.S. 249, 253-254 (1992). In any event, the court of appeals' analysis of Congress's aims was erroneous. Properly understood, the

purpose, history, and structure of the PMPA support the construction compelled by Section 2802(a)(1)'s text.

1. The court of appeals proceeded on an incomplete understanding of the PMPA's purpose and history. In the court's view, the Act was intended "to ensure that franchisees benefit from successful investment in their franchises." Pet. App. 24. The legislative history makes clear, however, that the PMPA was a compromise measure designed to "strike a balance between the at times conflicting interests of [franchisors and franchisees]." S. Rep. No. 731, 95th Cong. 2d Sess. 15 (1978) (*Senate Report*); see 123 Cong. Rec. 10,384 (1977) (statement of Rep. Brown) (the Act "represent[s] a delicate and effective compromise"); *id.* at 10,387 (statement of Rep. Dingell) ("[T]his bill is in a delicate state of balance."). Although Congress sought to redress "the disparity of bargaining power which exists between the franchisor and the franchisee," *Senate Report* 17, it also "recognize[d] the importance of providing adequate flexibility so that franchisors may initiate changes in their marketing activities to respond to changing market conditions and consumer preferences," *id.* at 19.

Section 2802(a)(1) reflects that balance. Congress sought to provide some protection for franchisees by limiting the circumstances in which franchisors can use or threaten the "extreme remedy" of ending the franchise. See *Senate Report* 18; *id.* at 15 ("The purpose of [the Act] is the establishment of minimum Federal standards governing the termination and nonrenewal of franchise relationships for the sale of motor fuel."); *id.* at 29 (suggesting that a franchisee could bring a claim under the PMPA where "the real estate lease or motor fuel supply agreement" was "terminat[ed]" or the trademark license was rendered "valueless"). At the same time, Congress declined "to create a federal common law for governing petroleum franchise agreements" or "to provide franchisees with a federal forum" to challenge conduct that,

although unfavorable to the franchisee, does not bring the franchise to an end. *Dersch Energies*, 314 F.3d at 861-862; see *id.* at 856 ("[T]he PMPA strikes a balance between the rights of franchisors and the rights of franchisees, by affording franchisees important but limited procedural rights, while at the same time providing franchisors with significant latitude to respond to changing market conditions."); *Esso Standard Oil Co.* v. *Department of Consumer Affairs*, 793 F.2d 431, 435 (1st Cir. 1986) ("Congress did not choose to use the PMPA to regulate the reasonableness of rents").[5]

The court of appeals emphasized the goal of franchisee protection to the exclusion of the countervailing goal of franchisor flexibility. As a result, the court stretched the prohibition on "termination" of franchises beyond the limited category of conduct, involving an actual end of the franchise, that Congress intended the Act to address. The decision below therefore upsets the delicate balance Congress struck. See *Burlington N. & Santa Fe Ry.* v. *United States*, 129 S. Ct. 1870, 1879 (2009) ("[L]iability may not extend beyond the limits of the statute itself.").

2. The court of appeals also misapprehended the remedies available to an aggrieved franchisee under the statutory scheme. The court concluded that franchisees must be per-

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[5] The dealers cite a portion of then-Judge Breyer's decision in *Veracka* v. *Shell Oil Co.*, 655 F.2d 445, 448 (1st Cir. 1981), stating that "[t]he legislative history of the [PMPA] shows that it[ ] * * * [sought] to prevent coercive or unfair franchisor practices." Pet. 11. But the legislative history the court cited in *Veracka* for that point, see *Senate Report* 17, 18, discussed Congress's efforts to limit "unfair terminations [and] nonrenewals." Nothing in that history reasonably suggests that Congress sought to prohibit other sorts of "unfair franchisor practices" or to treat those practices as terminations and nonrenewals, contrary to the most natural reading of the statute. In *Veracka* itself, the franchisor expressly indicated that it was not renewing the franchise, so these questions did not arise. See 655 F.2d at 447.

mitted to assert "constructive termination" even when the challenged conduct does not force an actual end to the franchise because "the congressional plan would be frustrated by requiring a franchisee to go out of business before invoking the protections of the PMPA." Pet. App. 23 (internal quotation marks and citation omitted). But that analysis ignores the existence of state-law remedies. The PMPA preempts any inconsistent state or local "law or regulation" governing the "termination" of a petroleum marketing franchise or the "nonrenewal" of a franchise relationship. 15 U.S.C. 2806(a)(1). Outside of those specific areas, however, Congress neither provided a federal remedy for breaches of franchise agreements nor limited States' authority to do so. See H.R. Rep. No. 737, 103d Cong., 2d Sess. 2-3 (1994) ("PMPA preemption does not extend to state regulation of underlying contract provisions."); *Senate Report* 42 ("State laws dealing with [other] aspects of the relationship are not preempted."). Thus, although Congress limited Section 2802(a)(1) of the PMPA to conduct that "terminate[s]" an existing franchise, state-law mechanisms remain available for breaches of contract that have less extreme consequences. The dealers' continued operations under the three essential elements of the franchise did not (as the jury's verdict on their state-law claims makes clear) prevent them from obtaining meaningful redress for the contract breaches that were found to have occurred. That continuing relationship simply remitted the dealers to state law to obtain relief on their contractual claims.

In any event, the court of appeals was simply incorrect in concluding that, if the word "terminate" in Section 2802(a)(1) is given its usual meaning, a franchisee must "abandon[] years of work and investment" before bringing a federal claim. Pet. App. 23. A franchisee who receives a notice of termination, or of imminent conduct that would effectively

force an end to a franchise element, can seek a preliminary injunction under 15 U.S.C. 2805(b)(2), enabling it to continue operating the franchise under the preexisting terms while the dispute is in litigation. Congress directed district courts to grant such relief if the franchisee demonstrates that "there exist sufficiently serious questions going to the merits to make such questions a fair ground for litigation," and that the balance of equities favors such relief. *Ibid.*[6] In an appropriate case, a franchisee therefore can make out a claim of constructive or informal termination without abandoning any of the basic components of its operation. This is not such a case, however, because the dealers "waited years before seeking" injunctive relief, "and at that point the court was obviously unable to "turn the clock back" and "preserve the status quo." Pet. App. 49-50 (quoting *Dersch Energies*, 314 F.3d at 863).

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[6] Section 2805(b)(2) also states that, to obtain injunctive relief, the franchisee must show that "the franchise of which he is a party *has been* terminated." 15 U.S.C. 2805(b)(2)(A)(i) (emphasis added). In common parlance, a franchisee who receives notice of an impending termination, or of conduct that would cause such a termination, "has been terminated" within the meaning of Section 2805(b)(2)(A)(i), just as an employee who has received a notice of termination that will be effective as of a date certain "has been terminated" from his employment. The requirement in Section 2805(b)(2) that the franchisee must show that its franchise "has been terminated" is therefore consistent with Congress's evident intent to permit franchisees to secure an injunction preventing a threatened termination from taking effect. See 123 Cong. Rec. at 10,383 (statement of Rep. Dingell); *id.* at 10,384 (statement of Rep. Long). It would make little sense for Congress to provide expressly for preliminary injunctive relief but require that the injury actually occur before such relief can be granted. Cf. *Lippo* v. *Mobil Oil Corp.*, 776 F.2d 706, 720 (7th Cir. 1985) (noting that "[i]n an action brought under section 2805(a) the franchisee has the burden of proving termination of the franchise" and that "[t]his must really mean attempted termination if the injunctive relief is to be of any use").

3. The decision below contravenes Congress's intent in an additional respect. The PMPA reflects Congress's effort to establish "a single, uniform set of rules" governing the termination of petroleum franchises so that refiners, many of whom operate nationwide, can organize their affairs without facing a "patchwork" of standards. *Senate Report* 16, 19; 124 Cong. Rec. 12,764 (1978) (statement of Sen. Jackson) ("The patchwork of these State laws has become a serious encumbrance on the franchisor-gasoline suppliers, so much so that [franchisors] are willing to accept the restrictions * * * in return for uniformity of laws across the nation."); *Mobil Oil Corp.* v. *Virginia Gasoline Marketers & Auto. Repair Ass'n*, 34 F.3d 220, 225 (4th Cir. 1994) ("Most petroleum franchisors do business in a number of states and Congress has provided [a nationwide standard] to ensure uniformity."), cert. denied, 513 U.S. 1148 (1995).

Contrary to that goal, the court of appeals prescribed a confusing and indeterminate test for deciding whether a franchisor has "terminate[d]" a franchise. The court of appeals disavowed a holding that "any material breach of the lease would necessarily be sufficient to sustain the constructive termination claim." Pet. App. 23. It indicated instead that the relevant contract breach must constitute "such a material change that it effectively ended the lease, even though the plaintiffs continued to operate the business." *Ibid.* But the court offered no workable standard for determining whether a particular contract breach has "effectively ended" the franchise when the franchisee is able and willing to continue its operations for a sustained period. Nor could the court have done so, given the essential contradiction involved in declaring "effectively ended" a franchise that is ongoing in each of its basic components. Application of the test articulated in the decision below would not lead to nationally uniform standards governing termination.

C. The Court Of Appeals' Decision Is Inconsistent With The Doctrine Of "Constructive Termination" In Other Contexts

The court of appeals' expansive reading of the word "terminate" in Section 2802(a)(1) is not supported by the general understanding of "constructive termination" doctrine in other contexts. As the court of appeals recognized, analogous common-law doctrines have traditionally "require[d] an actual severance of the relationship." Pet. App. 23. Consistent with that understanding, courts have applied the "constructive termination" concept to situations in which the challenged conduct has the practical effect of forcing an end to a particular legal relationship, even though the defendant has not formally or expressly severed his ties with the plaintiff.

In the field of employment law, for example, "[t]he employee must leave the workplace" to recover on a "constructive termination" theory. Pet. App. 23; see *Pennsylvania State Police* v. *Suders*, 542 U.S. 129, 134, 141 (2004) (to claim "constructive discharge" under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, the employee must quit and "show that the abusive working environment became so intolerable that her resignation qualified as a fitting response"). "The inquiry is objective: Did working conditions become so intolerable that a reasonable person in the employee's position would have felt compelled to resign?" *Id.* at 141; see *Bean* v. *Wisconsin Bell, Inc.*, 366 F.3d 451, 454 (7th Cir. 2004) (Posner, J.) (Constructive termination "refers to the situation in which an employer precipitates an employee's resignation by making the employee's working conditions unbearable."). Courts have also required an "actual severance of the relationship" to establish "constructive eviction in landlord-tenant law": "the tenant must move out." Pet. App. 22-23; *Brendle's Stores Inc.* v. *OTR*, 978 F.2d 150, 155 (4th Cir. 1992) (applying South Carolina law).

Courts have adopted a similar understanding of constructive termination under the Automobile Dealers Day in Court Act (ADDCA), 15 U.S.C. 1221 *et seq.*, which resembles the PMPA to the extent it limits the circumstances in which automobile manufacturers may "terminat[e]" a dealer franchise. 15 U.S.C. 1222 (providing that an automobile dealer may recover damages caused by "the failure of [an automobile manufacturer] to act in good faith in performing or complying with any of the terms or provisions of the franchise, or in terminating, canceling, or not renewing the franchise with said dealer"). As one court of appeals has explained, the ADDCA's restrictions on termination apply "where the manufacturer forces a termination by a dealer under circumstances which would warrant a court in concluding that even though in appearance the termination was voluntary it was in fact coerced by the manufacturer." *American Motors Sales Corp.* v. *Semke*, 384 F.2d 192, 195 (10th Cir. 1967). See *Imperial Motors, Inc.* v. *Chrysler Corp.*, 559 F. Supp. 1312, 1315 (D. Mass. 1983) (following *Semke* and describing the situation as a "constructive termination").[7]

The court of appeals reasoned that comparison of the "constructive termination" concept in the PMPA context to the treatments of such claims elsewhere is "misleading" because "sunk costs, optimism, and the habit of years might lead franchisees to try to make the new arrangements work." Pet. App. 22-23. That is not, however, a meaningful distinction. "[S]unk costs, optimism, and the habit of years" are by no means unique to petroleum franchises and do not provide a sound basis for differentiating the PMPA from other con-

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[7] Courts have not specifically addressed whether the dealership must end before a dealer claims "constructive termination" under the ADDCA. In both *Semke* and *Imperial Motors*, the dealer ceased its operations before bringing suit. See *Semke*, 384 F.2d at 194-195; *Imperial Motors*, 559 F. Supp. at 1314.

texts in which the "constructive termination" theory has been applied.[8]

The rationale for recognizing a claim of "constructive termination" under the PMPA is not that courts may add to the prohibitions that Congress imposed in the text of the Act. Rather, it is that the word "terminate" in Section 2802(a)(1) is properly construed to encompass franchisor conduct that, as a practical matter, forces an end to at least one element of the franchise relationship, even though the franchisor does not expressly abrogate the parties' agreement. The soundness of that interpretation, however, depends in large measure on the longstanding recognition of the concept of "constructive termination" in analogous contexts. Cf. *Suders*, 542

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[8] Few decisions address the question whether a dealer that remains in business may claim constructive termination under state franchise laws, and those decisions do not establish a consistent rule. Compare, *e.g.*, *Coast to Coast Stores (Cent. Org.), Inc.* v. *Gruschus*, 667 P.2d 619, 623 (Wash. 1983) (holding that a franchise is terminated under the Washington Franchise Investment Protection Act "only when the agreement between the franchisee and franchisor is brought to an end, terminating the franchisee's right to use the franchisor's trade name, service mark, or the like"), with *Petereit* v. *S.B. Thomas, Inc.*, 63 F.3d 1169, 1183 (2d Cir. 1995) (holding that the franchisee did not need to be driven "out of business * * * in order to justify a finding of constructive termination" under the Connecticut Franchise Act), cert. denied, 517 U.S. 1119 (1996). Courts applying state franchise laws, however, generally describe constructive termination in terms of franchisor conduct that precludes continued operations by the franchisee. See, *e.g.*, *American Bus. Interiors, Inc.* v. *Haworth, Inc.*, 798 F.2d 1135, 1141 (8th Cir. 1986) (concluding that constructive termination occurred under Missouri franchise law when franchisor "refuse[d] to do business with [its] franchisee"); *Remus* v. *Amoco Oil Co.*, 794 F.2d 1238, 1240 (7th Cir.) (Posner, J.) (suggesting that there could be a claim for constructive termination under Section 135.03 of the Wisconsin Fair Dealership Law when the franchisor's conduct "ma[de] the dealer's competitive circumstances so desperate that the dealer 'voluntarily' gives up the franchise"), cert. dismissed, 479 U.S. 925 (1986).

U.S. at 142 (noting that "[b]y 1964, the year Title VII was enacted, the [constructive discharge] doctrine was solidly established in the federal courts"). The dealers in this case seek to use that history as a basis for reading the word "terminate" in Section 2802(a)(1) to encompass non-explicit terminations, while treating as irrelevant the limitations that courts have traditionally placed on the "constructive termination" doctrine. There is no warrant for that approach.

D. Because The Conduct At Issue Here Did Not End The Franchises, The Dealers Could Not Recover Under the Act

The dealers in these cases failed to establish that their franchises were "terminate[d]" within the meaning of Section 2802(a)(1). Where, as here, a franchisor does not explicitly terminate any of the three elements of a petroleum marketing franchise, its conduct can properly be said to "terminate" the franchise in a "constructive" sense only if a reasonable franchisee in the circumstances would be effectively compelled to abandon one (or more) of the franchise elements, as when the franchisor's conduct forecloses any reasonable possibility that the business could be operated profitably. And a franchisee cannot reasonably claim to have been subjected to such effective compulsion unless it either (a) actually ceases that aspect of its operations or (b) promptly seeks preliminary injunctive relief preventing the franchisor from carrying out its announced intent to engage in conduct that would leave the franchisee no reasonable alternative but to abandon that aspect of its operations.

None of the eight dealers in this case satisfied that standard. The withdrawal of the rent subsidy did not force an end to any element of their franchise operations. All of the dealers continued to operate their franchises for a prolonged period—in most cases, for several years—after the rent subsidy was withdrawn. And all of the dealers either signed new

agreements, or agreed to extend existing agreements, that did not include the rent subsidy. See J.A. 268-331. That continued operation precluded any reasonable finding that the withdrawal of the subsidy effectively compelled the dealers to abandon their businesses. The defendants were therefore entitled to judgment as a matter of law with respect to the dealers' constructive termination claims.

II. THE COURT OF APPEALS CORRECTLY HELD THAT A FRANCHISEE MAY NOT RECOVER FOR "CONSTRUCTIVE" NONRENEWAL UNDER THE PMPA IF IT SIGNS AND OPERATES UNDER A RENEWED FRANCHISE AGREEMENT

The court of appeals' rejection of the dealers' "constructive nonrenewal" claims was compelled by Section 2802(a)(2)'s unambiguous text, and the soundness of that ruling is confirmed by the structure and purpose of other PMPA provisions governing the nonrenewal process. Because all eight dealers in this case either signed renewed agreements or sold their businesses before the previous agreements expired, the court of appeals correctly reversed the jury verdicts in their favor on their constructive nonrenewal claims.

1. Under the PMPA, a franchisor may not "fail to renew any franchise relationship" except for specified reasons. 15 U.S.C. 2802(a)(2). The Act defines the terms "fail to renew" and "nonrenewal" as the "failure to reinstate, continue, or extend" the relationship with the franchisee. 15 U.S.C. 2801(14). A franchisor cannot reasonably be said to have "fail[ed] to renew" within the meaning of the Act if it has in fact reinstated, continued, and extended the franchise relationship by offering a renewed agreement that the franchisee has accepted. See Pet. App. 32 (rejecting the dealers' constructive nonrenewal claim because the dealers had "signed

and operate[d] under the renewal agreement complained of").

A franchisor might explicitly fail to renew a franchise relationship by advising the franchisee that it will not be offered a new agreement when the current agreement expires. The franchisor might also indirectly or "constructively" fail to renew the relationship by insisting on changes that a franchisee would be forced to reject because continued operation under such terms would not be reasonably possible. See *Abrams Shell* v. *Shell Oil Co.*, 343 F.3d 482, 488 (5th Cir. 2003); *Dersch Energies*, 314 F.3d at 864. But in either circumstance, there must be a nonrenewal; the plain terms of the Act leave no room for a claim that a franchise relationship was "constructively" nonrenewed even though the parties entered into a new franchise agreement.[9]

The dealers assert (Pet. 24-25) that they "reserve[d]" their rights under the PMPA by signing the renewal agreements "under protest." The significance of the signed renewal agreements, however, is not that they constituted waivers of the dealers' legal rights, but that they negated the possibility of actionable PMPA violations. The PMPA affords franchisees the right to sue only to challenge an unlaw-

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[9] There is relatively little statutory or common-law history for "constructive nonrenewal" claims. The concept has arisen primarily in the insurance context where a new insurance contract modified the terms of a prior contract. See, *e.g.*, *American Cas. Co.* v. *Baker*, 22 F.3d 880, 893-894 (9th Cir. 1994); *American Cas. Co.* v. *Continisio*, 17 F.3d 62, 65-67 (3d Cir. 1994); *Adams* v. *Greenwood*, 10 F.3d 568, 572 (8th Cir. 1993). In accord with the position taken here, these cases indicate that signing a modified contract "is inconsistent with [an] assertion of constructive nonrenewal." *Baker*, 22 F.3d at 893 (quoting *Adams*, 10 F.3d at 572); see *Continisio*, 17 F.3d at 66 ("Even in a state where renewal is strictly defined as continuation of coverage on the same, or nearly the same, terms as the policy being renewed, acceptance of new terms constitutes a renewal.") (citation and internal quotation marks omitted).

ful termination or nonrenewal of the franchise. See 15 U.S.C. 2805 (providing a civil action to redress noncompliance only with Section 2802, prohibiting unlawful terminations or nonrenewals, and Section 2803, governing trial and interim franchises). The Act does not furnish a dealer whose franchise is in fact renewed with a claim for other grievances about the negotiation process or the manner in which a renewal occurred. A dealer that chooses to sign an agreement with its franchisor despite dissatisfaction with its terms has nonetheless renewed the franchise relationship and has no "failure to renew" cause of action to preserve.

2. The structure and purposes of the Act confirm that an actual renewal of the franchise relationship precludes a "nonrenewal" claim. As noted earlier, the PMPA represents a delicate balance between the goal of protecting the reasonable expectations of franchisees in the continuation of their businesses and the goal of preserving "adequate flexibility" for franchisors to "initiate changes in their marketing activities to respond to changing market conditions and consumer preferences." *Senate Report* 18-19. Congress designed the Act's nonrenewal provisions specifically to address those competing concerns. The dealers' theory of "constructive nonrenewal" is incompatible with the balance that Congress struck.

a. The PMPA provisions governing nonrenewal contain two key features. First, to preserve the franchisor's flexibility to respond to market demands, the Act permits a franchisor to propose new and different contractual terms at the expiration of a franchise agreement. See *Senate Report* 32 (noting that the Act allows "renewal of the franchise relationship [to] be on different terms"). To that end, the Act provides a broader range of justifications for failing to renew a franchise relationship than for terminating an existing franchise. See 15 U.S.C. 2802(b)(3) (setting forth additional

grounds for nonrenewal). Those additional lawful grounds for nonrenewal include "[t]he failure of the franchisor and the franchisee to agree to changes or additions to the provisions of the franchise," as long as the franchisor proposed the new terms "in good faith and in the normal course of business." 15 U.S.C. 2802(b)(3)(A)(i).

Second, the Act establishes a special procedural mechanism for resolving disputes about the legality of changes or additions to the terms of the previous agreement. 123 Cong. Rec. at 10,383 (statement of Rep. Dingell) ("[T]o assure that franchisees * * * receive the meaningful protections which this Federal legislation is intended to provide and to assure that [the Act's] flexibility does not frustrate the purposes of this legislation, the bill utilizes very special enforcement mechanisms."). When the franchisor offers a renewal agreement containing new terms, the franchisee may decide to accept those terms or to reject them. If the franchisee rejects the proposed agreement, the franchisor may then choose whether to modify the terms or instead to end the franchise relationship.

A franchisor that elects not to renew a franchise relationship in these circumstances must notify the franchisee of that decision, generally 90 days before the nonrenewal will take effect. 15 U.S.C. 2804(a). The notification must be in writing, must identify the reasons for the nonrenewal and the effective date, and must include a summary of the remedies available under the PMPA. 15 U.S.C. 2804(c). Upon receipt of that notice, the franchisee may seek preliminary injunctive relief permitting it to continue operating under the preexisting agreement while it challenges the legality of the franchisor's decision. 15 U.S.C. 2805(b)(1).[10] Congress specifically

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[10] The franchisee might allege, for example, that the parties' failure to agree to changed franchise terms did not constitute a lawful basis for

prescribed a relaxed showing for obtaining such relief and required district courts to grant an injunction if that showing is made. 15 U.S.C. 2805(b)(2); see pp. 2-3, *supra*.

b. The "constructive nonrenewal" theory the dealers espouse, under which a franchisee may enter into a renewed agreement "under protest" and later allege a "nonrenewal," would seriously undermine this scheme in at least three respects. First, as suggested above, that theory would expand the Act's coverage to encompass a broad range of conduct that does not actually result in the end of the franchise relationship. Second, the dealers' argument would replace the procedural mechanism Congress created with a fundamentally different scheme. Under the balance struck by Congress, the franchisee must either sign or reject a proposed renewal agreement, and a franchisor faced with a rejection may then choose either to modify the objectionable terms or give notice of nonrenewal. The procedure the dealers propose would invert that system. It would permit a dealer to execute a new agreement "under protest," thereby granting the franchisee the option either to continue operating under the new agreement or, if the terms later proved unfavorable, to challenge it as a "constructive nonrenewal." As the court of appeals observed, the franchisee would gain the benefit of the contract with nothing to lose, even if it later sued and "its claims were rejected by the courts." Pet. App. 30.

Third, the dealers' theory would frustrate Congress's intent that renewal disputes be resolved before any new agreement takes effect. That scheme furthers Congress's

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nonrenewal because the proposed changes were not "the result of determinations made by the franchisor in good faith and in the normal course of business," 15 U.S.C. 2802(b)(3)(A)(i), or because the proposed changes were made "for the purpose of converting the leased marketing premises to operation by employees or agents of the franchisor for the benefit of the franchisor," 15 U.S.C. 2802(b)(3)(A)(ii).

goal of giving franchisors flexibility to implement efficient marketing changes, *Senate Report* 19, by providing certainty about the validity of a renewed agreement containing modified terms. Allowing a franchisee to challenge such an agreement after executing it would destroy that certainty. And because the PMPA has a one-year statute of limitations, 15 U.S.C. 2805(a), the prospect of a "constructive nonrenewal" claim would "extend the period of uncertainty through the entire first year of a [renewal] contract," which in many cases is only a few years in duration. Pet. App. 30. Franchisors might respond by refraining from proposing new terms that reflect a more efficient strategy, or by "abandon[ing] the [franchise] model entirely." *Id.* at 31. In the long term, that result could cause considerable harm to consumers who may absorb the increased distribution costs through higher fuel prices. See generally *Atlantic Richfield Co.* v. *USA Petroleum Co.*, 495 U.S. 328, 343 n.13 (1990) ("[T]he public is not served by forcing [a] manufacturer to abandon [the most efficient means of distribution].").

c. The dealers contend that, by prohibiting the franchisee from claiming nonrenewal after it has signed a renewal agreement, the decision below forces franchisees "to choose between accepting an unlawful and coercive contract in order to stay in business and rejecting it and going out of business in order to preserve a cause of action." Pet. 20 (citation omitted). That contention ignores Congress's provision of a remedial mechanism tailored to the situation the dealers describe. As explained above, see pp. 25-26, *supra*, a franchisee need not go out of business in order to challenge a franchisor's "take it or leave it" offer to renew on modified terms. Rather, the franchisee may refuse the offer and seek a preliminary injunction allowing it to continue operating on the terms of the previous agreement while the litigation proceeds. See *Dersch Energies*, 314 F.3d at 863; 2 W. Michael

Garner, *Franchise and Distribution Law and Practice* § 15:10, at 15-37 to 15-38 (Sept. 2003) ("The plain language of the PMPA contemplates an actual ending of the franchise relationship * * * . A franchisee who is presented with a new agreement that is so coercive that it suggests that the franchisor has an ulterior motive to prevent renewal can refuse the agreement and then move for a preliminary injunction under the Act.").

There is also no merit to the dealers' argument (Pet. 21) that the PMPA's remedial scheme is ineffective because few franchisees have the financial resources to bring suit to forestall an unlawful nonrenewal. The PMPA allows successful dealers to recover attorneys' fees, expert costs, compensatory damages, and, in some circumstances, punitive damages. 15 U.S.C. 2805(d)(1). Such provisions are normally considered sufficient to encourage suit. Cf. *City of Riverside* v. *Rivera*, 477 U.S. 561, 578 (1986) ("The function of an award of attorney's fees is to encourage the bringing of meritorious civil rights claims which might otherwise be abandoned because of the financial imperatives surrounding the hiring of competent counsel.") (quoting *Kerr* v. *Quinn*, 692 F.2d 875, 877 (2d Cir. 1982)). And even if some dealers face economic difficulty in pursuing the remedies that the PMPA provides, that fact cannot justify holding the franchisor liable for "fail[ing] to renew [the] franchise relationship," 15 U.S.C. 2802(a)(2), when no failure to renew has actually taken place. Dealers in these circumstances may have a claim against the franchisors under state law, but not under the explicit terms of the PMPA.

3. The dealers in this case did not establish that the defendants "fail[ed] to renew" their franchise relationships within the meaning of the PMPA. The evidence at trial showed that seven of the eight dealers signed and operated under renewal agreements, and that the eighth dealer sold

his franchise before the franchise term expired. See Shell Br. 10-11. The court of appeals therefore correctly granted judgment to the defendants on the dealers' "constructive nonrenewal" claims.

CONCLUSION

The judgment of the court of appeals should be reversed with respect to the dealers' "termination" claims and affirmed with respect to the dealers' "nonrenewal" claims.

Respectfully submitted.

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IN THE
Supreme Court of the United States

MAC'S SHELL SERVICE, INC., ET AL.,

Petitioners,

v.

SHELL OIL PRODUCTS COMPANY LLC, ET AL.,

Respondents.

SHELL OIL PRODUCTS COMPANY LLC, ET AL.,

Petitioners,

v.

MAC'S SHELL SERVICE, INC., ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE AMERICAN PETROLEUM INSTITUTE AS *AMICUS CURIAE* SUPPORTING SHELL OIL PRODUCTS COMPANY LLC, MOTIVA ENTERPRISES LLC AND SHELL OIL COMPANY, INC.

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INTEREST OF *AMICUS CURIAE*

The American Petroleum Institute ("API") is a non-profit District of Columbia corporation that represents the United States oil and natural gas industry.[1] API's more than 400 members cover all facets of the industry, including exploration, production, transportation, refining, and marketing.

API's members have a significant interest in the issue in this case. The Petroleum Marketing Practices Act, 15 U.S.C. §§ 2801-2807 ("PMPA" or "the Act"), establishes federal standards for the termination or non-renewal by an oil refiner of a service station dealer's franchise. The PMPA provides dealers with a cause of action against oil refiners that terminate a franchise or fail to renew it in a manner that violates the statute. Thus, many of API's members are subject to suit under the Act.

This case presents the question whether a service station dealer that continues to operate its franchise may nevertheless sue the franchisor for wrongful "termination" or "nonrenewal" under the PMPA. The First Circuit held that a service station operator can maintain a suit for constructive termination, but the text, structure, and purpose of the statute make clear that the First Circuit erred in

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[1] Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus*, its members, or its counsel made a monetary contribution to its preparation or submission. The parties have consented in writing to the filing of this brief.

according the PMPA such broad scope. Because API members may be subjected to PMPA suits, they have a strong interest in limiting the statute to the circumstances in which Congress intended it to apply.

API frequently participates in legislative, administrative, and judicial proceedings that present issues of national concern, including issues arising under the PMPA.[2] API believes that its participation as *amicus curiae* in this case will offer the Court an industry-wide perspective on the question presented.

STATEMENT

1. Congress enacted the PMPA to establish "minimum federal standards governing the termination and nonrenewal of franchise relationships for the sale of motor fuel by the franchisor or supplier of such fuel." S. Rep. No. 731, 95th Cong., 2d Sess. at 15 (1978). Congress sought to displace "an uneven patchwork of [state] rules governing franchise relationships" with a "single, uniform set of rules governing the grounds for termination and non-renewal . . . and the notice which franchisors must provide franchisees prior to termination of a franchise or non-renewal." *Id.* at 19. To promote "certainty and uniformity in franchise relationships which permeate a nationwide motor fuel distribution and marketing network," the PMPA

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[2] *See, e.g., Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007); *Texaco, Inc. v. Dagher*, 547 U.S. 1 (2006); *Texaco, Inc. v. Hasbrouck*, 496 U.S. 543 (1990).

"preempts state law in the subject areas in which the federal legislation deals, i.e., termination and non-renewal of franchise relationships and the notice applicable thereto," if the state law "is not the same as the applicable provision" of the PMPA. *Id.* at 16. *See* 15 U.S.C. § 2806(a)(1).

The PMPA defines a "franchise" to mean the use by a franchisee of "a trademark which is owned or controlled by" a refiner "in connection with the sale, consignment, or distribution of motor fuel." 15 U.S.C. § 2801(1)(A). "Franchise" is also defined to include a contract for the supply of motor fuel or a lease of the premises on which the motor fuel is sold "under a trademark which is owned or controlled by" the refiner. *Id.* § 2801(1)(B). Courts refer to these three components of the franchise as the "statutory element[s]" of the franchise. Pet. App. 18a. "Franchise" is further defined to include "the unexpired portion of any franchise, . . .which is transferred or assigned as authorized by the provisions of such franchise or by any applicable provision of State law which permits such transfer or assignment without regard to any provision of the franchise." 15 U.S.C. § 2801(1)(B)(iii).

In setting federal standards for termination of a franchise, Congress attempted to "strike a balance between" (S. Rep. No. 731, at 15) franchisees' interest in avoiding "arbitrary or discriminatory termination" (*id.*) and franchisors' need for "adequate flexibility" to "initiate changes in their marketing activities to respond to changing market conditions and consumer preferences" (*id.* at 19). Concerned about franchisors "resort[ing] to termination of the franchise for the most technical or minor violations

of the contract" (*id.* at 18), Congress enumerated the grounds on which the franchisor may lawfully terminate the franchise. *See* 15 U.S.C. § 2802(b)(2). Those grounds include a failure by the franchisee to comply with a franchise provision that "is both reasonable and of material significance," *id.* § 2802(b)(2)(A); "[a] failure by the franchisee to exert good faith efforts to carry out" the franchise, *id.* § 2802(b)(2)(B); "[t]he occurrence of an event which is relevant to the franchise relationship" and which renders termination of the franchise "reasonable," *id.* § 2802(b)(2)(C); a written agreement between the franchisor and franchisee to terminate the franchise, *id.* § 2802(b)(2)(D); and a "determination made by the franchisor in good faith and in the normal course of business to withdraw from the marketing of motor fuel through retail outlets in the relevant geographic market," *id.* § 2802(b)(2)(E).[3]

Congress also sought to ensure that procedural regularity attends the termination process by imposing notification requirements on franchisors. *See* 15 U.S.C. § 2804. The PMPA requires that the franchisor notify the franchisee in writing of the date on which termination will take effect and the reasons for which the franchise is being terminated. *Id.* § 2804(c). That notice must

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[3] The listed grounds for termination are also grounds for non-renewal. Section 2802(b)(3) sets out additional grounds for non-renewal, including the failure of the parties "to agree to changes or additions to the provisions of the franchise" if the changes or additions "are the result of determinations made by the franchisor in good faith and in the normal course of business." 15 U.S.C. § 2802(b)(3)(A).

generally be provided at least 90 days before the date termination "takes effect." *Id.* § 2804(a)(2).

The PMPA provides franchisees with a cause of action against a franchisor that fails to comply with the statute's provisions governing termination or non-renewal. 15 U.S.C. § 2805(a). It directs a court to grant a franchisee a preliminary injunction to compel continuation or renewal of the franchise relationship while the court considers the merits of the franchisee's challenge to the franchisor's termination or non-renewal, provided certain specified conditions are met. *Id.* § 2805(b). The franchisee need only establish "sufficiently serious questions going to the merits to make such questions a fair ground for litigation" and that the balance of hardships tips in its favor. *Id.* § 2805(b)(2). The statute authorizes prevailing franchisees to recover actual damages and, in cases involving "willful disregard" of the statute, punitive damages. *Id.* § 2805(d)(1)(A), (B). Franchisees are also entitled to "reasonable attorney and expert witness fees" unless the franchisee recovers "only nominal damages," in which case such fees may be awarded in the court's discretion. *Id.* § 2805(d)(1)(C).

The PMPA contains two provisions addressing the statute's relationship with state law. The first provision provides that "no State or any political subdivision thereof may adopt, enforce, or continue in effect any provision of any law or regulation . . . with respect to termination . . . of any such franchise or to the nonrenewal . . . of any such franchise relationship unless such provision of such law or regulation is the same as the applicable provision of this subchapter." 15 U.S.C. § 2806(a)(1).

The second provision addresses assignments of the franchise and provides that "[n]othing in this subchapter authorizes any transfer or assignment of any franchise or prohibits any transfer or assignment of any franchise as authorized by the provisions of such franchise or by any applicable provision of State law which permits such transfer or assignment without regard to any provision of the franchise." *Id.* § 2806(b)(1).

2. Despite the fact that the PMPA by its terms applies only to "termination" or "non-renewal" of the franchise, the plaintiffs, Shell service station operators in Massachusetts (the "dealers"), sued Shell Oil Company, Inc., and its assignee, Motiva Enterprises LLC (collectively, "Shell") under the PMPA while signing new agreements and continuing to operate their franchises. They did so on the theory that Shell's elimination of a rent reduction program and other changes to the manner of computing rent amounted to "constructive termination" and "constructive[] nonrenew[al]"of the franchises. Pet. App. 4a.[4] The jury returned a verdict in the dealers' favor, awarding them $1.3 million on their constructive termination claim and $1.2 million on their constructive nonrenewal claim. The district court added $1.16 million in attorney's fees and $209,000 in expert witness fees pursuant to the PMPA.

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[4] Specifically, the dealers alleged that Shell Oil Company constructively terminated their franchises by assigning the franchises to Motiva Enterprises LLC, which canceled the rent subsidy. Pet. App. 4a

3. The court of appeals affirmed in part and reversed in part. Pet. App. 15a-25a. The court held that the PMPA provides a cause of action for constructive termination but not for constructive nonrenewal.

On the constructive termination claim, the court held that a dealer that continues to operate the franchise—that is, continues to use the refiner's trademark, to receive motor fuel, and to lease the premises—can nevertheless claim that it was "terminated" within the meaning of the PMPA. Pet. App. 17a-18a. In so holding, the court relied on the Fourth Circuit's decision in *Barnes v. Gulf Oil Corp.*, 795 F.2d 358 (4th Cir. 1986), which held that a constructive termination claim under the PMPA is available even when the franchisee continues to operate its business if an assignment of the franchise either (1) violates state law or (2) results in a breach of one of the three statutory elements of the franchise. Pet. App. 15a-18a.

The court of appeals concluded that constructive termination under the PMPA, unlike constructive termination in several other contexts, does not "require an actual severance of the relationship." *Id.* at 18a. The court reasoned that "requiring a franchisee to go out of business before invoking the protections of the PMPA" would frustrate the "congressional plan." *Id.* (internal quotation marks omitted). Instead, the court held that the PMPA provides a cause of action for constructive termination where a franchisee alleges both that the franchisor (or its assignee) breached one of the three statutorily protected contracts—the contract for use of the trademark, motor fuel, or the

premises—and that the breach is "such a material change that it effectively ended the lease, even though the [franchisees] continued to operate the business." *Id.* (internal quotation marks omitted).

The court of appeals agreed with Shell, however, that the PMPA does not provide a cause of action for constructive nonrenewal. Pet. App. 21a-25a. The court noted that while the Ninth Circuit recognized such a claim in *Pro Sales, Inc. v. Texaco, U.S.A.*, 792 F.2d 1394 (9th Cir. 1986), that decision "has been rejected by the other circuits to consider the issue." Pet. App. 22a. The court observed that a constructive nonrenewal theory is inconsistent with the text of the PMPA, which "after all, requires a franchisor to provide a notice of nonrenewal, 15 U.S.C. § 2805(c), and then provides a framework for the franchisee to seek preliminary relief on receipt of that notice, *id.* § 2805(b)(2)." Pet. App. 22a. The court further observed that the Fifth and Seventh Circuits have held that the PMPA's "notice-and-preliminary-relief structure" reflects Congress's intent "to limit the reach of the PMPA to cases where either a notice is given or an actual nonrenewal has taken place." *Id.* (citing *Abrams Shell v. Shell Oil Co.*, 343 F.3d 482, 489 & n.16 (5th Cir. 2003), and *Dersch Energies, Inc. v. Shell Oil Co.*, 314 F.3d 846, 865-66 (7th Cir. 2002)). The court thus declined to "recognize a claim for nonrenewal under the PMPA where the franchisee has signed and operates under the renewal agreement complained of." *Id.* at 25a.

SUMMARY OF ARGUMENT

The court of appeals' decision to recognize a cause of action for constructive termination

misconstrues the scope of the PMPA. The PMPA defines a franchise to include the contracts between the refiner and the dealer that authorize the dealer to use the refiner's trademark, sell the refiner's motor fuel, and occupy leased marketing premises. 15 U.S.C. § 2801(B)(i), (ii). The text of the PMPA makes clear that a franchisor must terminate a franchise, or notify the franchisee of its intent to terminate the franchise, before a franchisee has a cognizable claim for wrongful termination. Read together, the substantive and procedural provisions governing termination do not support the court of appeals' recognition of a cause of action for alleged material breaches of the franchise that fall short of termination.

The court of appeals justified its departure from the text of the Act on the ground that requiring termination of the franchise would frustrate the "congressional plan" to protect franchisees' investment in their businesses. Pet. App. 18a. The court's reasoning lacks merit. First, the best evidence of Congress's intent is the text of the statute, which does not authorize causes of action challenging a franchisor's decision merely to change the terms of the franchise. Second, the remedial plan Congress adopted allows a franchisee threatened with termination to obtain a preliminary injunction compelling continuation of the franchise while a court examines the grounds on which the franchisor intends to effect termination. Moreover, state law causes of action remain available to remedy alleged breaches of contract that do not involve termination of the franchise. By allowing franchisees to sue for breach of contract under the

PMPA, the court of appeals has broadened the scope of the federal regime well beyond what Congress intended.

The court of appeals' approach frustrates the uniform national regime that Congress sought to establish for the termination and nonrenewal of petroleum franchises. Under the court of appeals' decision, determining whether a constructive termination occurred will often turn on the application of *state* law, as it did here. The court of appeals upheld a decision that Shell breached an oral promise to continue the rent subsidy despite a clause in the lease agreement (the "integration clause") providing that the lease constituted the entire contract and could be amended only in writing. The court of appeals concluded that under Massachusetts law, "the question of integration is one of fact reserved for the trial judge" (Pet. App. 13a) and that the judge did not commit clear error in "conclud[ing] that the lease was not an integrated agreement." *Id.* at 14a. Having determined that the oral agreement was enforceable, the court of appeals held that by breaching it, Shell effected a constructive termination under the PMPA. Thus, the success of the dealers' claim that they were constructively terminated turned on an application of state law, an outcome contrary to Congress's desire to establish a "uniform" (S. Rep. No. 731, at 19) and "federal" standard (*id.* at 15) for the termination of petroleum franchise relationships.

The court of appeals' flawed approach can be traced to the Fourth Circuit's opinion in *Barnes v. Gulf Oil Corp.*, 795 F.2d 358 (4th Cir. 1986). That decision recognized two grounds for a claim of

wrongful termination where, as in this case, there has been an assignment of the franchise. The *Barnes* court held that the franchisee could establish that her franchise had been terminated under the PMPA by showing either that the price term in the contract for gasoline supply was breached or that the franchise was assigned in violation of state law. 795 F.2d at 362-64. Neither ground has support in the text of the Act; both expand the PMPA well beyond its intended scope and destroy uniformity in the law governing the termination of petroleum franchises.

For the same reasons that the court of appeals erred in recognizing a cause of action for constructive termination, the court of appeals correctly rejected the dealers' claims for constructive nonrenewal. The substantive, procedural, and remedial provisions of the PMPA governing nonrenewal are parallel to the provisions governing termination. Properly construed, those provisions provide a cause of action for nonrenewal only where "a notice [of nonrenewal] is given or an actual nonrenewal has taken place." Pet. App. 22a.

ARGUMENT

I. The PMPA Does Not Create A Cause Of Action For Constructive Termination.

The PMPA does not provide a cause of action for constructive termination. In recognizing a cause of action under the PMPA for material changes to the franchise that are adverse to the franchisee, the court of appeals deviated from the language and structure of the Act, which creates a cause of action for wrongful termination only when the franchisor

has actually terminated the franchise or notified the franchisee of its intent to do so.

A. The Text and Structure of the PMPA Do Not Allow a Cause of Action for Constructive Termination.

The PMPA defines a franchise to mean the use by a franchisee of "a trademark which is owned or controlled by" a refiner "in connection with the sale, consignment, or distribution of motor fuel." 15 U.S.C. § 2801(1)(A). "Franchise" is also defined to include a contract for the supply of motor fuel or a lease of the premises on which the motor fuel is sold "under a trademark which is owned or controlled by" the refiner. *Id.* § 2801(1)(B). The PMPA does not define the term "termination," other than to state that the term includes "cancellation." 15 U.S.C. § 2801(17). "Termination" is ordinarily understood to mean "end in time or existence: close, cessation, conclusion." Webster's Third New International Dictionary 2359 (1993). If Congress had intended the term to cover a much broader range of conduct that is not commonly understood as "termination," it is fair to assume Congress would have said so. Moreover, the PMPA's provisions governing the grounds for termination and its notification requirements confirm that the Act provides a remedy only for a franchisor's decision to terminate the franchise.

The PMPA enumerates several grounds on which a franchisor may lawfully terminate the franchise, all of which presuppose that termination involves an end to the franchise (*i.e.*, to the use of the

trademark, to the supply of motor fuel, or to the lease of the premises, *see* 15 U.S.C. § 2801(B)), and not merely a change to the franchise terms that has adverse financial consequences for the franchisee. *See* 15 U.S.C. § 2802(b)(2)(A) (franchisor may terminate franchise if franchisee fails to comply with a reasonable and materially significant franchise term if franchisor knew about failure in specified time period preceding notification of termination); *id.* § 2802(b)(2)(B) (franchisor may terminate franchise if franchisee fails to "exert good faith efforts to carry out the provisions of the franchise" if failure continues into specified time period preceding notification of termination); *id.* § 2802(b)(2)(C) (franchisor may terminate franchise based on occurrence of an event relevant to the franchise relationship and that renders termination reasonable, provided the event occurred while the franchise was still in effect and franchisor knew of the event in specified time period preceding notification of termination); *id.* § 2802(b)(2)(D) (franchisor may terminate franchise based on written agreement between the franchisor and franchisee to terminate the franchise); *id.* § 2802(b)(2)(E) (franchisor may terminate franchise based on good-faith determination in the normal course of business to withdraw from the marketing of motor fuel through retail outlets in the relevant geographic market). These provisions contemplate a termination of the franchise, initiated by the franchisor, and set out acceptable reasons for it.[5]

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[5] As explained in note 3, *supra*, a franchisor may refuse to renew a franchise relationship on the same grounds, and (continued...)

The PMPA also contains a highly structured notice procedure that reinforces the conclusion that termination under the Act means a decision by the franchisor to terminate the franchise, not merely a decision to change the terms of the franchise in a manner adverse to the franchisee. The PMPA generally requires the franchisor to provide written notice of its intent to terminate the franchise at least "90 days prior to the date on which such termination or nonrenewal takes effect." 15 U.S.C. § 2804(a)(2). If a franchisor terminates the franchise without providing the requisite notice, the franchisee may sue under the PMPA for a violation of Section 2802. *See id.* § 2805(a); *id.* § 2802(b)(1)(A).

Under the court of appeals' rule that a claim for constructive termination lies where a breach of a franchise term is serious enough to "effectively end[] the lease, even though the plaintiffs continued to operate the business" (Pet. App. 18a), the notice requirement becomes unworkable, because the franchisor will not necessarily know whether or when a change in the franchise terms will "effectively [but not actually] end[] the lease." *Id.* The notice provisions thus operate together with the provisions setting out the legitimate grounds for termination to regulate the franchisor's decision to terminate the franchise, not merely to change the franchise terms in a manner that has an adverse effect on the franchisee.

Section 2802(b)(3) provides additional grounds for nonrenewal.

The PMPA provides a cause of action against franchisors that "fail[] to comply with the requirements of section 2802." 15 U.S.C. § 2805(a).[6] As discussed above, Section 2802 is concerned exclusively with a decision by a franchisor to sever its relationship with the franchisee either through termination or non-renewal of the franchise relationship. Because Section 2805(a) cross-references Section 2802 to define the cause of action, the cause of action that Section 2805(a) creates for failure to comply with the termination provisions extends only to termination or threatened termination of a franchise that the franchisee contends is not justified by the grounds enumerated in Section 2802. It does not encompass the dealers' claim that Shell breached the rent term of the lease. *See Abrams Shell v. Shell Oil Co.*, 216 F. Supp. 2d 634, 639 (S.D. Tex. 2002) (rejecting constructive termination theory under the PMPA "because it conflicts with the PMPA's remedial scheme"), *aff'd*, 343 F.3d 482 (5th Cir. 2003).

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[6] The PMPA also provides a cause of action against a franchisor that fails to comply with the requirements of Section 2803, which provides special rules for the nonrenewal of "[t]rial and interim franchises," 15 U.S.C. § 2803, or with the requirements of Section 2807, which prohibits franchisors from imposing certain restrictions relating to the installation of a renewable fuel pump or the sale of renewable fuel.

B. The PMPA's Remedial Provisions Allow Franchisees to Protect Their Franchise When Threatened With Termination.

The court of appeals justified its ruling on the ground that "[t]he congressional plan would be frustrated by requiring a franchisee to go out of business before invoking the protections of the PMPA." Pet. App. 18a (internal quotation marks omitted). But the best evidence of Congress's intent is the text of the statute, *see West Virginia Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 98 (1991), which provides no support for the theory that changes to terms of the franchise short of termination are governed by the PMPA. Moreover, the PMPA includes provisions that permit a franchisee to challenge a franchisor's decision to terminate the franchise without relinquishing the franchise. Those provisions impose notice requirements on franchisors who intend to terminate the franchise, 15 U.S.C. § 2804, and permit franchisees to file suit and obtain a preliminary injunction compelling continuation or renewal of the franchise relationship while the merits of the franchisee's challenge are being litigated. *Id.* § 2805(b). Congress even relaxed the traditional equitable standards, requiring the granting of a preliminary injunction on a franchisee's showing merely that "there exist sufficiently serious questions going to the merits to make such questions a fair ground for litigation" and that the balance of hardships tips in its favor. *Id.* § 2805(b)(2).

As the Seventh Circuit has explained, the PMPA's notice requirements, together with the "lenient standard" for injunctive relief, "protect[] franchisees not only from arbitrary and discriminatory termination or nonrenewal, but also from the harmful effects of threatened termination or nonrenewal." *Dersch Energies, Inc. v. Shell Oil Co.*, 314 F.3d 846, 863 (7th Cir. 2002). That is so because under the Act, "the district court is required to issue an injunction to protect the franchisee's economic interests during the pendency of the case" if the franchisee meets the Act's "lenient standard." *Id.* at 865.

The remedial scheme Congress established thus provides a means for franchisees to protect their franchises while challenging a planned termination. Moreover, state law causes of action remain available to protect franchisees that allege that the franchisor committed a breach of contract short of termination of the franchise. Indeed, in this very case the dealers brought state law causes of action that were duplicative of their PMPA claims. *See* Pet. App. 37a (Judgment ¶ 2(v)) ("Because plaintiff's claims under Count II (Violation of the PMPA based on Constructive Termination of the franchise relationship) and under Count V (Breach of the Lease) sought the same damages for loss of the STIP subsidy and lost business value and the jury awarded the same damages, plaintiff is entitled to recover as to those two awards only once."); *id.* at 39a; 40a; 42a; 44a; 46a; 48a; 50a; 52a. The text and structure of the PMPA provide no support for the court of appeals' recognition of a cause of action for alleged material breaches of the franchise that do not

result in termination, a holding that federalizes ordinary breach of contract claims that are the traditional province of state law.

II. Permitting A Claim For Constructive Termination Based On A Material Breach Of Franchise Terms Frustrates The Uniformity Congress Sought To Establish By Enacting The PMPA.

Congress enacted the PMPA to establish a uniform, federal standard to govern the termination and non-renewal of petroleum franchise relationships. A uniform approach is crucial to the effective operation of the national market for motor fuel distribution. The court of appeals' recognition of a cause of action under the PMPA for constructive termination is not compatible with the congressional goal of uniformity because the determination of whether such a termination occurred hinges on the application of *state* law.

A. Congress Enacted the PMPA to Create a National Standard for the Termination and Nonrenewal of Petroleum Franchises.

In enacting the PMPA, Congress established a "single, uniform set of rules" governing the termination and non-renewal of petroleum franchise relationships, which "permeate a nationwide motor fuel distribution and marketing network." S. Rep. No. 731, at 16, 19. To achieve the goal of uniformity, Congress replaced the "uneven patchwork of rules governing franchise relationships which differ from state to state" (*id.* at 19) with a nationwide standard

for termination and non-renewal of franchise relationships. To ensure uniformity, Congress preempted any state laws or regulations governing termination or nonrenewal that are different from the PMPA. 15 U.S.C. § 2806(a)(1).

The uniformity Congress sought serves important goals. Because refiners distribute their fuel nationwide, a uniform regulatory approach permits refiners to operate under a single set of rules, which promotes certainty and efficiency in their franchise relationships. The costs of dealing with unpredictable market conditions are compounded when the legal regime governing the termination and non-renewal of franchise relationships varies from one jurisdiction to another. The higher costs associated with an uncertain and non-uniform legal regime harm both franchisors and franchisees.

B. The Court of Appeals' Decision Precludes Uniformity Because the Viability of a Constructive Termination Claim Depends on State Law.

In this case, the court of appeals held that the dealers had a cause of action under the PMPA for wrongful termination despite the undisputed facts that the dealers continued to operate their franchises without interruption and that Shell neither terminated the dealers' franchises nor notified the dealers of an intent to terminate their franchises. Pet. App. 15a-21a. In particular, the court held that Shell's alleged breach of oral promises to retain a rent subsidy program amounted to a "constructive"

termination of the dealers' franchises because of the "financial hardship" it allegedly caused them. *Id.* at 21a.

Without attempting to ground the concept of constructive termination in the text of the Act, the court held that "the breach of the statutory element of the franchise"—*i.e.*, the contract to use the refiner's trademark, the contract for the supply of motor fuel, or the lease of the premises—"does not have to be a total breach." Pet. App. 18a. Rather, the court held the breach need only constitute "a material change that . . . effectively ended the lease, even though the plaintiffs continued to operate the business." *Id.* The court acknowledged that the doctrine of constructive termination typically requires "an actual severance of the relationship" (*id.*), but reasoned that "requir[ing] an actual abandonment of years of work and investment before we recognize a right of action under the PMPA would be unreasonable." *Id.*

Under the court of appeals' approach, the determination of whether a franchisee was constructively terminated within the meaning of the PMPA turns on the application of *state* law. The basis for the dealers' constructive termination claim is that Shell breached an alleged oral promise to maintain a rent subsidy, notwithstanding a clause in the lease agreement providing that the lease constituted the entire contract and that any amendments to it must be in writing. Applying Massachusetts law, the district court permitted the jury "to consider what the parties said and did concerning the lease" including "actions prior to or contemporaneous with the execution of the written

lease." Pet. App. 14a. Because Massachusetts reserves the determination of integration for the trial court as a question of fact, the court of appeals affirmed the district court's "conclu[sion] that the lease was not an integrated agreement" under Massachusetts law. *Id.* Thus, because Massachusetts law (as applied by the federal courts) permitted consideration of Shell's alleged prior or contemporaneous oral promises in the face of the integration clause, the dealers could establish that Shell committed a material breach of the franchise terms that amounted to a constructive termination under the PMPA. *See* 15 U.S.C. § 2805(c) ("[T]he franchisee shall have the burden of proving the termination of the franchise[.]").

In other states, this question would have been resolved differently. Courts in Ohio and Florida, construing contract language identical to that at issue here, have read the integration clause as foreclosing evidence of alleged oral promises that the rent subsidy would be permanent. *See Casserlie v. Shell Oil Co.*, No. 88361, 2007 WL 1559510, at *7-8 (Ohio Ct. App. May 31, 2007), *aff'd*, 902 N.E.2d 1 (Ohio 2009); *Hazara Enterprises, Inc. v. Motiva Enterprises, LLC*, 126 F. Supp. 2d 1365, 1373-1374 (S.D. Fla. 2000). Other jurisdictions similarly give dispositive effect to a clear integration clause. *See, e.g., Tangren Family Trust v. Tangren*, 182 P.3d 326, 331 (Utah 2008) ("[W]e will not allow extrinsic evidence of a separate agreement to be considered on the question of integration in the face of a clear integration clause."); *Air Safety, Inc. v. Teachers Realty Corp.*, 706 N.E.2d 882, 885 (Ill. 1999) ("[W]here parties formally include an integration

clause in their contract, they are explicitly manifesting their intention to protect themselves against misinterpretations which might arise from extrinsic evidence."). In states applying such a rule, the dealers here could not have succeeded in establishing constructive termination under the PMPA based on Shell's breach of alleged oral promises made before or contemporaneous with the execution of the written lease.

By allowing a cause of action under the PMPA for constructive termination based on a material breach of one of the franchise terms, the court of appeals allowed state law to determine whether the franchisor has effected a termination under the PMPA. Given Congress' goal of replacing the "uneven patchwork of [state] rules" with a "single, uniform set of rules" governing termination of petroleum franchises, S. Rep. No. 731, at 19, that result could not possibly be what Congress intended.

III. An Assignment Does Not Constitute Termination Of A Franchise Under The PMPA Merely Because The Assignee Breaches The Contract Or Because The Assignment Violates State Law.

In recognizing a cause of action under the PMPA for constructive termination, the court of appeals relied on the Fourth Circuit's decision in *Barnes v. Gulf Oil Corp.*, 795 F.2d 358 (4th Cir. 1986). *See* Pet. App. 15a-18a (citing and quoting *Barnes*). *Barnes* set out two theories to justify relief for franchisees claiming, as the dealers did here, that an assignment of their franchises violated their

rights under the PMPA. Neither theory is properly cognizable under the PMPA.

First, *Barnes* held that a "franchisee can obtain relief under the Act if the franchisee [by virtue of an assignment of the franchise] can no longer obtain gasoline at the stipulated franchise price." *Id.* at 362. *Barnes* is incorrect. As explained above, the text, structure, and purpose of the PMPA preclude a cause of action for constructive termination predicated on a breach of contract by the franchisor that does not effect a termination of the franchise. It follows that, contrary to *Barnes* and the court of appeals' decision here, a cause of action does not lie "against the assignor of a franchise when the assignee breaches the franchise." Pet. App. 17a (citing *Barnes*, 795 F.2d at 362). The court of appeals reasoned that permitting a franchisee to pursue a PMPA claim against the assignor when the assignee commits a breach "prevents the assignor/franchisor from shielding itself against liability through the use of another corporation." *Id.* This rationale lacks merit because its premise is flawed: even absent an assignment, the franchisor would not be liable for wrongful termination under the PMPA for a mere breach of contract that did not constitute a termination of the franchise.

Second, *Barnes* held that an assignment that is invalid under state law "is tantamount to a constructive termination of the franchise" in violation of the PMPA. 795 F.2d at 363. The court of appeals embraced that theory in dicta here, stating that "an assignment that is violative of state law, . . . gives rise to a claim under the PMPA against the original franchisor/assignor." Pet. App.

15a-16a. This Court should make clear that the PMPA does not permit a cause of action based on this theory either. Absent such clarification, franchisees may simply recast material-breach claims under the PMPA as termination claims based on assignments in violation of state law. These two assignment-based claims go hand-in-hand because many states, including Massachusetts, *see* Mass. Gen Laws ch. 106, § 2-210 (2009), have incorporated into their statutory schemes language from the Uniform Commercial Code declaring that an assignment that "increase[s] materially the burden or risk" imposed by the contract is invalid. *See* UCC § 2-210 (2004); *see, e.g.*, Tenn. Code Ann. § 47-2-210 (2009); Ohio Rev. Code Ann. § 1302.13(B) (2009); Va. Code Ann. § 8.2-210(2) (2009); Or. Rev. Stat. § 72.2100(2) (2007). Thus, when an assignment results in a change to the gasoline price, or to another statutory element, that is unfavorable to the franchisee, the franchisee will usually proceed under both theories, arguing that a constructive termination has occurred both because the assignment breached a statutory element and because the assignment violated state law.

For example, the plaintiff in *Clark v. BP Oil Co.*, 137 F.3d 386, 390-91 (6th Cir. 1998), argued both that the franchisor constructively terminated his franchise by breaching the supply and lease agreements and that the franchisor assigned the franchise in violation of Tennessee law. Both arguments were based on the same underlying facts: the franchisor's assignment of the franchise to a third party that charged a higher price for gasoline. Similarly, in *Shukla v. BP Exploration & Oil, Inc.*,

115 F.3d 849, 852-53 (11th Cir. 1997), the plaintiff argued that the franchisor constructively terminated his franchise on the theories that "the assignment increased his burdens under the franchise agreement and was therefore invalid under Florida law" and that the assignee's "pricing practices constituted a breach of the supply component of his franchise agreement, resulting in a termination of the franchise." *See also, e.g., Portland 76 Auto/Truck Plaza, Inc. v. Union Oil Co. of Cal.*, 153 F.3d 938, 948 (9th Cir. 1998); *Sawhney v. Mobil Oil Corp.*, 970 F. Supp. 366, 371-72 (D. N.J. 1997), *rev'd*, 173 F.3d 421 (3d Cir. 1998); *Cedar Brook Serv. Station, Inc. v. Chevron U.S.A., Inc.*, 746 F. Supp. 278, 282 (E.D.N.Y. 1990), *aff'd*, 930 F.2d 908 (2d Cir. 1991).

Barnes' conclusion that a franchise assignment in violation of state law terminates the franchise rests on a faulty understanding of the law of assignments. An assignment that violates state law is invalid, but an invalid assignment does not dissolve the original contract between franchisor and franchisee. Rather, the assignment is simply ineffective, and the original contractual obligations between franchisor and franchisee remain. *See, e.g.*, U.C.C. § 2-210 cmt. 3; E. Allen Farnsworth, *Farnsworth on Contracts* § 11.4 (2001); *Restatement (Second) of Contracts* § 317 cmt. a & illus. 2 (1981).[7]

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[7] If the contract prohibits assignments, then the franchisee would have a state-law claim against the franchisor for breach of contract. If the original franchisor no longer exists, then the rules of successor liability would apply.

Because the franchise agreement between the franchisor-assignor and franchisee would remain in force, the *Barnes* court was wrong to conclude that an invalid assignment would terminate the franchise. *Barnes* sought to support its holding by reference to one part of the statutory definition of a franchise. Under that definition, a franchise includes "the unexpired portion of any franchise . . . which is transferred or assigned as authorized . . . by any applicable provision of state law." 795 F.2d at 363 (quoting 15 U.S.C. § 2801(1)(B)(iii)). That definition makes clear that the PMPA governs a franchise that is assigned in accordance with state law, but it does not address franchise assignments that violate state law. Where an assignment is ineffective, the assignor remains bound by the contract, and the agreement between the dealer and the franchisor is thus still a "franchise" within the more general definitions of 15 U.S.C. § 2801(1)(A), (B)(i)-(ii).

The *Barnes* court also relied on Section 2806(b)(1) of the Act, which states:

> Nothing in this subchapter authorizes any transfer or assignment of any franchise or prohibits any transfer or assignment of any franchise as authorized by the provisions of such franchise or by any applicable provision of state law which permits such transfer or assignment without regard to any provision of the franchise.

Barnes, 795 F.2d at 363. The *Barnes* court inferred from this provision that "an assignment that is

unauthorized by state law is prohibited" by the PMPA. *Id.* But Section 2806(b)(1) is an expression of *neutrality* toward state law on assignments. Contrary to *Barnes*, it cannot be read to provide that an assignment prohibited by state law is itself a violation of the PMPA. Nothing in the provision suggests, much less provides, that the PMPA incorporates state law on assignments. If Congress had intended to provide that an assignment in violation of state law constitutes an unlawful termination under the PMPA, it easily could have said so. This Court should thus reject as misguided the *Barnes* court's attempt to infer such intent from various provisions of the PMPA that do not address termination.[8]

IV. The PMPA Does Not Create A Cause Of Action For Constructive Nonrenewal.

For the very reasons that the court of appeals erred in allowing a cause of action for constructive termination, it correctly decided that the PMPA does not provide a cause of action for constructive nonrenewal. Pet. App. 21a-25a (relying on the text and structure of the Act to reject the dealers' constructive nonrenewal claim). Because the PMPA

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[8] Moreover, the *Barnes* court's view that an assignment in violation of state law amounts to a termination under the PMPA is entirely at odds with the PMPA's text and structure, which require actual termination or nonrenewal of the franchise to trigger the protections of the Act. *See* Part I, *supra*. A PMPA cause of action for assignments that violate state law would also undercut the PMPA's goal of national uniformity by expressly resting recovery under the Act on state law. *See* Part II, *supra*.

defines "nonrenewal" as the "failure to reinstate, continue, or extend the franchise relationship," 15 U.S.C. § 2801(14), a franchisee who has signed a renewal agreement cannot claim that a nonrenewal within the meaning of the Act has occurred. Moreover, as it does for franchise termination, the PMPA establishes a detailed set of notice requirements and preliminary relief provisions governing the nonrenewal of petroleum franchises that are nonsensical unless nonrenewal is understood to mean what it says—a severance of the relationship between franchisor and franchisee. *See* 15 U.S.C. §§ 2804 and 2805(b); Pet. App. 22a ("This notice-and-preliminary-relief structure is evidence that Congress intended to limit the reach of the PMPA to cases where either a notice [of nonrenewal] is given or an actual nonrenewal has taken place.") (citing *Abrams Shell v. Shell Oil Co.*, 343 F.3d 482, 489 n.16 (5th Cir. 2003), and *Dersch Energies*, 314 F.3d at 865)). The sections of the Act providing the permissible grounds for nonrenewal likewise presume that an actual nonrenewal will take place. *See* 15 U.S.C. § 2802(b).

The dealers have argued that the court of appeals' rejection of constructive nonrenewal will force franchisees "to choose between accepting an unlawful and coercive contract in order to stay in business and rejecting it and going out of business in order to preserve a cause of action." Petition for a Writ of Certiorari, *Mac's Shell Service, Inc., et al. v. Shell Oil Prods., Inc., et al.*, No. 08-240, 2008 WL 3919440, at *20 (U.S. Aug. 21, 2008). This contention ignores the provisions of the PMPA that protect franchisees from having to make such a

choice. A franchisor that intends not to renew usually must give the franchisee 90 days notice prior to nonrenewal. 15 U.S.C. § 2804(a). Franchisees may then seek a preliminary injunction under the lenient standards set forth in 15 U.S.C. § 2805, which allow them to continue to operate under the preexisting terms while the court decides the merits of their claims. *See* Part I(B), *supra*.

CONCLUSION

The judgment of the court of appeals with respect to the dealers' constructive termination claims should be reversed, and the judgment with respect to the dealers' constructive nonrenewal claims should be affirmed.

Respectfully submitted,

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